Mr Justice Swayne

SUPREME COURT OF THE UNITED STATES.

No. ~~204~~. 207.

BYRAM D. MINER, Plaintiff in Error,

vs.

AMHERST WILLOUGHBY AND SIMON POWERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

GIDEON, Printer.

1589

SUPREME COURT OF THE UNITED STATES.

No. 294.

BYRAM D. MINER, Plaintiff in Error,

vs.

AMHERST WILLOUGHBY AND SIMON POWERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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Writ of Error.

UNITED STATES OF AMERICA,
Supreme Court of the United States.

The President of the United States to the Justices of the Supreme Court of the State of Minnesota, greeting:—

Whereas, it has been represented to us that in a certain action lately pending in your court, wherein Byron D. Miner was appellant, and Amherst Willoughby and Simon Powers were respondents, error has intervened to the damage, as is said, of the said appellant, and we being willing that such error, if any there should be, may be corrected, and full and speedy justice done in that behalf—

Do command you, that, if final judgment be thereupon given, then, without delay, you will cause to be sent to us, distinctly and openly, under the seal of your court, and annexed to this writ, a certified transcript of the judgment roll, bill of exceptions, and other proceedings on file and of record in said cause in your court; that, having the same in our Supreme Court on or before the first day of the next term thereof, to be held at the Capitol, in the city of Washington, District of Columbia, we may cause further to be done therein what of right and according to the laws of the land ought to be done.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this twenty-fourth day of February, A. D. 1860.

[SEAL.] J. J. NOAH,
Clerk of the Supreme Court, State of Minnesota.

Writ of error received and filed February 24th, 1860.
J. J. NOAH, Clerk.

To the Honorable Justices of the Supreme Court of the United States—

The answer of the Justices of the Supreme Court of the State of Minnesota to the above writ of error is hereto annexed, duly certified, and is hereby returned in obedience thereto.

Witness the Hon. Lafayette Emmett, Chief Justice of said Supreme Court, this thirty-first day of March, A. D. 1860.

[SEAL.] J. J. NOAH, Clerk Supreme Court.

Endorsed: Writ of Error, Supreme Court of the United States, Byram D. Miner, plaintiff in error, against Amherst Willoughby and Simon Powers, defendants in error.

M. E. AMES,
Of Counsel for Pl'ff in Error.

United States of America, *ss.*

To Amherst Willoughby and Simon Powers, greeting:—

You and each of you are hereby summoned and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, District of Columbia, on the first Monday in December next, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Minnesota, it being a court of final resort in said State, wherein you, the said Amherst Willoughby and Simon Powers, are plaintiffs and respondents, and Byram D. Miner is defendant therein, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done the parties in that behalf.

Witness the Honorable Lafayette Emmett, Chief Justice of the Supreme Court of the State of Minnesota, this fifteenth day of February, in the year of our Lord one thousand eight hundred and sixty.

L. EMMETT,
Ch. Jus. Sup. Court.

M. E. AMES,
Att'y for B. D. Miner, Pl'ff in Error.

Service of the within and the receipt of a copy thereof by us is admitted this 24th day of February, 1860.

BRISBIN & BIGELOW,
Att'ys for Willoughby and Powers.

Endorsed: Citation, No. 294. Byram D. Miner *vs.* Amherst Willoughby and Simon Powers. (Original.) Filed Feb. 24, 1860.
J. J. NOAH, Cl'k Sup. Ct.

M. E. AMES,
Att'y for Pl'ff in Error.

(Copy.)

United States of America, *ss.*

To Amherst Willoughby and Simon Powers, greeting:—

You and each of you are hereby summoned and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington, District of Columbia, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Minnesota, it being a court of final resort in said State, wherein you, the said Amherst Willoughby and Simon Powers, are plaintiffs and respondents, and Byram D. Miner is defendant therein, to show cause, if any there be, why the judgment in said writ of error

mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Honorable Lafayette Emmett, Chief Justice of the Supreme Court of the State of Minnesota, this fifteenth day of February, in the year of our Lord one thousand eight hundred and sixty.

L. EMMETT,
Ch. Jus. Sup. Court.

M. E. ARNES,
Att'y for B. D. Miner, Plt'ff in Error.

The above endorsed as follows:—

Citation. Byron D. Miner *vs.* Amherst Willoughby, James Powers. (Original.) Filed Feb. 24, 1860. J. J. Noah, Cl'k Sup. Ct. M. E. Anus, Att'y for Pl'ff in Error.

Service of the within and the receipt of a copy thereof by us is admitted this 24th day of February, 1860.

BRISBIN & BIGELOW,
Att'ys for Willoughby & Powers.

Bond.

(Copy.)

Know all men by these presents that we, Byron D. Miner as principal, and George W. Ewing and Smalwood Noel as sureties, all of the city of Fort Wayne and State of Indiana, are held and firmly bound unto Amherst Willoughby and Simon Powers, both of the city of St. Paul, in the State of Minnesota, in the sum of one thousand dollars, lawful money of the United States, for the payment whereof well and truly to be made we bind ourselves, one and each of our heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with our seals, this 26th day of January, A. D. 1860.

The condition of the above obligation is such, that whereas the above bounden Byron D. Miner has this day caused to be issued out of the Supreme Court of the United States a writ of error directed to the Supreme Court of the State of Minnesota, in a cause wherein the said Willoughby and Powers are plaintiffs and respondents, and the said Miner defendant and appellant, and in which cause the said last named court have rendered a final judgment and decree against the said Byron D. Miner.

Now, if the said Byron D. Miner, the appellant, shall pay or cause to be paid all such costs arising and growing out of the issuing of said writ of error, and all costs that may be adjudged or decreed against him in favor of said Amherst Willoughby and Simon Powers, respondents, then this obligation shall be void, otherwise shall remain in full force.

In witness whereof we have hereunto set our hands and seals, this 26th day of January, A. D. 1860.

BYRON D. MINER, [SEAL.]
GEO. W. EWING, [SEAL.]
SMALWOOD NOEL. [SEAL.]

Signed, sealed, and delivered in presence of us,
WM. LYTLE,
JOHN P. HEDGES.

State of Indiana, City of Fort Wayne.

Personally came before the undersigned commissioner of the State of Minnesota, residing at the city of Fort Wayne, in the State of Indiana, George W. Ewing and Smalwood Noel, who being sworn, declare and say that they are each worth the sum of one thousand dollars over and above their liabilities.

SMALWOOD NOEL.

Sworn to and subscribed before me, this 26 Jan'y, 1860, as witness my hand and official seal at Fort Wayne.

[Wm. Lytle, Commissioner of Minnesota, Fort Wayne.]

WM. LYTLE,
Commissioner of the State of Minnesota.

The above endorsed as follows:—

Bond. Byrum D. Miner & als., W. Amherst Willoughby, Simon Powers. Approved Feb'y 15, '60, L. Emmett, Ch. Jus. Sup. Court. Filed and approved Feb'y 24, 1860, J. J. Noah, Cl'k Sup. Ct.

Territory of Minnesota, County of Ramsey, District Court, Second Judicial District.

AMHERST WILLOUGHBY & SIMON POWERS
ag'st
BYRON D. MINOR.

To Byron D. Minor, defendant: You are hereby summoned and required to answer the complaint of the pl'ff in the above action, which is filed in the office of the clerk of the District Court of the Second Judicial District of the Territory of Minnesota, at St. Paul, in the county of Ramsey, and serve a copy of your answer to the said complaint on the subscribers, at their office in the city of St. Paul, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint as aforesaid, the pl'ffs will apply to the court for the relief demanded in the complaint.

WILKINSON, BABCOCK & BRISBIN,
Pl'ffs' Att'ys, St. Paul, Ramsey Co., M. T.

Territory of Minnesota, County of Ramsey, District Court, Second Judicial District.

AMHERST WILLOUGHBY & SIMON POWERS
ag'st
BYRON D. MINOR.

The complaint of the above named pl'ffs respectfully shows to this court, that Wm. G. Ewing, deceased, late of Fort Wayne, Indiana, was in his lifetime, and on the thirteenth of March, 1850, seised in fee simple of the following described premises, viz: "A certain lot or piece of land situate, lying, and being in the town of Saint Paul, in the territory of Minnesota, being a piece of land on the northwest corner of block twenty-six (26), fronting on Robert Street fifty feet, and running back on Fourth Street one hundred feet more or less, and that the said Wm. G. Ewing continued so to be seised of the said described premises until the 27th day of September, A. D. 1850.

The pl'ffs further complaining allege, that while the said Wm. G. Ewing was seised of the premises as aforesaid, to wit, on the 13th day of March, A. D. 1850, one David Olmsted, his attorney in fact, executed and delivered to the pl'ffs an instrument in writing in the words and figures following:—

Know all men by these presents, that we, William G. Ewing, Fort Wayne, in the State of Indiana, and David Olmsted, of Long Prairie, in the territory of Minnesota, are held and firmly bound unto Amherst Willoughby and Simon Powers in the sum of five hundred dollars, lawful money of the United States, to be paid unto the said Willoughby & Powers, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated the thirteenth day of March, A. D. 1850. Whereas the said William G. Ewing hath agreed to sell and convey to the said Willoughby & Powers a certain lot or piece of land situate, lying, and being in the town of Saint Paul, in the territory of Minnesota, described as follows, to wit: being a piece of land on the northwest corner of block twenty-six (26), fronting on Robert Street fifty feet (50), and running back on Fourth Street one hundred feet, more or less; and said Willoughby & Powers in consideration thereof have given to the said William G. Ewing their note of hand for the sum of three hundred dollars, interest, payable on or before the first day of September, A. D. 1850.

Now the conditions of this obligation is such that, if after the payment of the said note, and at the request of the said Willoughby and Powers, the said William G. Ewing shall make and execute to the said Willoughby and Powers, their heirs and assigns, a good and sufficient deed of conveyance of the said premises, and shall permit the said Willoughby and Powers, their heirs and assigns, to receive and take to their own use the rents and profits of the pre-

mises until such conveyance shall be made and executed as aforesaid, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed at St. Paul, in the territory of Minnesota, on the day and year first above written.

The words "is such," interlined before signing.

DA'D OLMSTED, [SEAL.]
WILLIAM G. EWING, [SEAL.]
By DA'D OLMSTED,
His att'y in fact.

In presence of
L. A. BABCOCK.

The pl'ffs further complaining, allege that the said instrument in writing was duly filed for record in the office of the Register of Deeds of the county of Ramsey, M. T., where the premises mentioned in the said instrument are situated, on the 25th day of June, A. D. 1850, and recorded in the office of the said Register, in book A of bonds, on pages 11 and 12 thereof.

The plaintiffs further complaining, aver that immediately upon the execution and delivery of the said instrument in writing pursuant to and by virtue thereof, the pl'ffs went into the possession and occupation of the premises mentioned and described therein; that immediately upon such occupation, to wit, in the month of April, A. D. 1850, they commenced the erection of expensive and permanent structures thereon, which have been continually used and occupied for business purposes by the pl'ffs ever since their erection, and that the pl'ffs have expended in the erection of such structures, the sum of three thousand dollars, or thereabouts.

Pl'ffs further complaining, allege that at the time of the execution and delivery of the said instrument in writing, the sum of three hundred dollars was a full and adequate consideration for the premises therein mentioned and described, but that by reason of the improvements of the pl'ffs, and the advancement in the price of real estate in the city of St. Paul, the premises are now worth the sum of ten thousand dollars or thereabouts.

The pl'ffs for further complaint allege, that they paid to the said Wm. G. Ewing, the consideration mentioned in the said instrument in writing, at the time and in the manner therein mentioned, and complied with all the conditions of the said instrument by the plaintiffs to be complied with or performed, and the said Wm. G. Ewing suffered the pl'ffs to enjoy and possess the said premises with the rents and profits thereof, and assented to and ratified the act and deed of his said agent, hereinbefore set forth.

The pl'ffs further complaining, allege that notwithstanding the premises and the agreements and promises of the said Wm. G. Ewing, he utterly failed to comply with the said agreements and promises by making and executing to the pl'ff a good and sufficient

deed of conveyance of the premises mentioned in the said instrument in writing, or any conveyance thereof whatever, although often thereto requested, but on the contrary thereof, and in violation of the said instrument in writing, and of the premises and agreements of the said Wm. G. Ewing, the said Ewing did sell and convey to the defendant Byron D. Minor the premises mentioned and described in the said instrument in writing, by a deed of conveyance dated the 27th day of September, A. D. 1850. Pl'ff further complaining, aver that the def't well knowing the existence of the said instrument in writing, and well knowing the possession and occupation of the premises mentioned in the said deed of conveyance, accepted and received from the said Wm. G. Ewing, the said deed of conveyance.

Whereupon the pl'ffs prays that the said deed from the said Wm. G. Ewing to the def't may be declared cancelled, or the premises mentioned in the said instrument in writing may be adjudged to the pl'ffs, or for such other or further relief as to court may seem meet and proper in the premises.

WILKINSON, BABCOCK & BRISBIN,
Pl'ffs' Att'ys, St. Paul, M. T.

Territory of Minnesota, County of Ramsey, *ss.*

Amherst Willoughby, one of the above pl'ffs of the said county, being duly sworn, says that the foregoing complaint is true of his own knowledge, except as to matters which are therein stated on his information or belief, and as those matters, that he believes it to be true. AMHERST WILLOUGHBY.

Sworn to before me, this 19th day of March, A. D. 1855.
JOSEPH LEMAY, Justice of the Peace.

Filed, March 19th, 1855.
GEO. W. PRESCOTT, Clerk.

Territory of Minnesota, County of Ramsey, District Court, Second Judicial District.

AMHERST WILLOUGHBY AND SIMON POWERS
ag'st
BYRON D. MINOR.

Territory of Minnesota, County of Ramsey, *ss.*

Amherst Willoughby, one of the above plaintiffs, being duly sworn, deposes and says, that the above named defendant is a resident of Fort Wayne, in the State of Indiana, and is not a resident of this territory. Defendant further says, that the plaintiffs have a cause of action against the defendant, which cause of action arises upon the following facts, viz: On the 13th day of March, 1850, one William G. Ewing, of Fort Wayne, Indiana, late deceased, executed and delivered by Daniel Olmsted, his attorney in fact, to the plaintiffs a writing under seal, by which the said Ewing agreed for

a consideration therein mentioned, to convey to the plaintiffs the northwest corner of block 26, fronting on Robert street 50 feet, and running back on Fourth street 100 feet, more or less, all being in the city of St. Paul; that plaintiffs have paid the consideration in writing, expressed and fulfilled all its terms; that plaintiffs, by virtue of the said writing, (which was recorded in the office of the Register of Deeds of Ramsey County, M. T., on the 25th of June, 1850, the pl'ffs went into possession of the said premises and erected thereon expensive structures of the value of $3000, or thereabouts; that the said Wm. G. Ewing has failed and refused, although in his lifetime thereto by pl'ffs often demanded, to convey to pl'ffs the said premises, or fulfil in any way the said agreement; but on the contrary thereof, the pl'ffs being in possession of the premises, conveyed the same to the def't by a deed of conveyance dated the 20th of September, 1850; and the def't accepted and received the said conveyance, notwithstanding the premises; that the land mentioned in the said writing first mentioned, and the conveyance to the def't is in St. Paul, Ramsey Co., M. T.; that the object of the action is to determine the title to said real estate, and the def't cannot be found in Minnesota, after search.

AMHERST WILLOUGHBY.

Sworn to before me, this 19th day of March, 1855.
JOSEPH LEMAY, Justice of the Peace.

Territory of Minnesota, County of Ramsey, District Court, Second Judicial District.

AMHERST WILLOUGHBY AND SIMON POWERS
ag'st
BYRON D. MINOR.

It appearing to me by the affidavit of Amherst Willoughby, one of the above pl'ffs, that the def't is not a resident of the Territory of Minnesota, and cannot be found therein, that the def't is a proper party to an action relating to real property in this territory; that the def't claims title to real property in the territory, and that the action arises on obligation.

It is ordered that the summons in the above action be published once each week for six successive weeks, in the Minnesotian Newspaper, printed at St. Paul, in Ramsey County, and that a copy of such summons be deposited in the post-office forthwith, addressed to the said def't, at his place of residence, at Fort Wayne, in the State of Indiana. M. SHERBURN, Judge.

At Chambers, done the 19th day of March, 1855. Filed March 19th, 1855. GEO. W. PRESCOT, Clerk.

Territory of Minnesota, County of Ramsey, *ss.*

George W. More, of said county, being first duly sworn, deposes and says, that he is one of the editors of the Weekly Minnesotian,

a newspaper published in the city of St. Paul, County of Ramsey, and Territory of Minnesota, and that the copy summons hereunto annexed has been published in the said newspaper once in each week for six successive weeks, commencing on the 22d day of March, 1855, and continuing up to the 15th of May, 1855.

GEORGE W. MOORE.

Sworn and subscribed to before me this 14th day of June, A. D. 1855. JOHN F. HOYT, Notary Public, M. T.

Territory of Minnesota, County of Ramsey, District Court, Second Judicial District.

AMHERST WILLOUGHBY AND SIMON POWERS
ag'st
BYRON D. MINOR.

To Byron D. Minor, defendant—

You are hereby summoned and required to answer the complaint of the plaintiffs in the above action, which is filed in the office of the Clerk of the District Court of the Second Judicial District of the Territory of Minnesota, at St. Paul, in the county of Ramsey, and serve a copy of your answer to the said complaint on the subscribers at their office in the city of St. Paul, within twenty days after the service thereof, exclusive of the days of such service, and if you fail to answer the complaint as aforesaid the pl'ffs will apply to the court for the relief demanded in the complaint.

WILKINSON, BABCOCK & BRISBIN,
Plaintiffs' Attorney.

St. Paul, Ramsey Co., M. T., 6 t. w.

Printer's fees, $5 75.

Territory of Minnesota, County of Ramsey, *ss.*

John B. Brisbin, of the said county, being first duly sworn says, that on or before the 27th day of May, A. D. 1855, he deposited in the post-office at St. Paul, Ramsey County, M. T., a copy of the summons hereto annexed, enclosed in a sealed envelope, and addressed to Byron D. Minor, at Fort Wayne, Indiana, that being the supposed last place of residence of the said Byron D. Minor up to the 22d of March, 1855, the time of the first publications of the said summons. JNO. B. BRISBIN.

Subscribed and sworn to before me this 7th June, 1855.

JAMES STARKEY,
Notary Public, Minnesota Territory.

Territory of Minnesota, County of Ramsey,
District Court Second Judicial District.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINOR.

To Byron D. Minor, defendant—

You are hereby summoned and required to answer the complaint of the plaintiffs in the above action, which is filed in the office of the Clerk of the District Court in the Second Judicial District of the Territory of Minnesota, at St. Paul, in the county of Ramsey, and serve a copy of your answer to the said complaint on the subscribers at their office in the city of St. Paul, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint as aforesaid, the pl'ffs will apply to the court for the relief demanded in the complaint.

WILKINSON, BABCOCK, & BRISBIN,
Plaintiffs' Attorneys.

Saint Paul, Ramsey, M. T. 6 t. w.

Territory of Minnesota, District Court,
2d Judicial District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINOR.

Territory of Minnesota, County of Ramsey, *ss.*

Lorenzo A. Babcock being duly sworn deposes and says, that he is one of the attorneys for the plaintiff in the above entitled action, that the service of the summons is that said action was made by the publication thereof pursuant to an order of Hon. Moses Sherburne, Judge of this Court, that more than twenty days have elapsed since the expiration of the time prescribed in the said order for publication, and that no answer or demurrer to the complaint in this action has been received by the plaintiffs' attorneys.

L. A. BABCOCK.

Subscribed and sworn before me this 14th June, 1855.
JOHN F. HOYT, Notary Public, M. T.

Filed June 14th, 1855. GEO. W. PRESCOTT, Clerk.

Territory of Minnesota,
District Court 2d District, County of Ramsey.

Notice of Retainer.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINOR.

You will please take notice that we are retained and employed

by the above named defendant to defend the above entitled action, and have caused the defendant's appearance to be entered therein, and that a copy of the original complaint in the action is demanded.

Yours respectfully,
AMES & VAN ETTEN,
Defendant's Attorneys.

Saint Paul, June 11th, 1855.

To Messrs. Wilkinson, Babcock & Brisbin, Pl'ffs' Att'ys.

Filed Nov. 24, 1855. GEO. W. PRESCOTT, Clerk.

Territory of Minnesota,
District Court 2d District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINOR.

On reading the answer of the defendant, duly verified in the complaint of the plaintiffs in this action, and the affidavit of the defendant.

It is hereby ordered that the plaintiffs or their attorneys, show cause, in any exists, before me at my chambers at the capitol in the city of Saint Paul, in the county aforesaid, on the 22d day of August instant, at ten (10) o'clock in the forenoon of that day, why there should not be granted, and an order made in this cause, allowing the defendant to file and serve his answer to the complaint in this action, and defend the same.

And it is further ordered that a copy of the defendant's answer and affidavit, with a copy of this order, be served upon the plaintiffs' attorneys within ten days from the date thereof.

Dated August 17th, 1855. At Chambers.
M. SHERBURN, Judge.

Filed Nov. 24th, 1855. GEO. W. PRESCOTT, Clerk.

Territory of Minnesota,
District Court 2d District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINOR.

The answer of Byron D. Minor, the above named defendant, to the complaint of the plaintiffs in this action, respectfully states and shows to the court that the defendant admits that William G. Ewing, now deceased, late of Fort Wayne, in the State of Indiana, was in his lifetime, and at the time stated in the complaint, seised in fee simple and the owner of the following described premises, viz: A certain lot or piece of land situate, lying and being in the town of Saint Paul, in the Territory of Minnesota, on the north-west corner of block No. twenty-six (26), fronting on Robert street,

fifty feet, and running back on Fourth street one hundred feet, more or less, being the same premises described in the said complaint, and that afterwards, on or about the 27th day of September, A. D. 1850, the said Ewing did sell and convey the premises, piece and parcel of land aforesaid, to the defendant above named, by a good and sufficient deed of conveyance to pass the title thereof to the defendant, which deed of the premises aforesaid from said Wm. G. Ewing to the defendant was duly recorded in the office of the register of deeds of the county of Ramsey, on or about the 18th day of October, A. D. 1850, in book "B," on pages 19 and 20.

And the defendant further shows that he purchased the premises above described, and received the deed thereof aforesaid, and paid a full, fair and adequate consideration and price for the same to said Ewing, the grantor, that is to say, the sum of four hundred and fifty dollars, which was the full value thereof at the time, and so purchased the said premises, and received the titled thereof from said Ewing, without any notice, knowledge or information whatever that the said plaintiffs, or either of them, had or claimed to have any title or interest in or to the said premises, or any lien thereon, equitable or otherwise, and without any notice or knowledge whatever that the plaintiffs, or either of them, had bargained or contracted for the said premises, as is stated in the said complaint or otherwise.

And the answer of the defendant further states and shows that the defendant has not any knowledge or information thereof sufficient to form a belief whether, that while the said William G. Ewing was seised of the premises aforesaid, on the 13th day of March, A. D. 1850, or at any other time, one David Olmsted executed and delivered to the plaintiffs an instrument in writing, as recited and stated in said complaint or not.

And further states and shows that the defendant is informed and believes, and therefore admits it to be true that the plaintiffs have been in the possession and occupation of the premises described in the complaint, and that they have erected a building and improvements thereon, and that they use and occupy the same for business purposes. But the defendant says he has not any knowledge or information thereof sufficient to form a belief as to where or at what time the plaintiffs went into the possession or occupation of the premises aforesaid, or where they commenced making or made improvements thereof, or what amount they have expended in the erection of structures, building or other improvements upon said premises.

And the answer of the defendant further states and holds that the said premises mentioned in the complaint are not worth the sum of ten thousand dollars, but the defendant is informed and believes, and therefore says, that the said premises are now worth the sum of about six thousand dollars, and no more. And the defendant denies that the plaintiffs, or either of them, have ever paid or caused to be paid to the said William G. Ewing the sum

stated in the complaint, as consideration or purchase money for the said premises in the complaint mentioned, or any other sum whatever, as stated in the said complaint or otherwise. And denies that the said William G. Ewing has ever received any sum of money, or other valuable consideration from the said plaintiffs, or either of them, for the said premises, or as consideration or purchase money thereof. And denies that the said Ewing has at any time assented to or ratified any act, deed, or agreement for the sale of the said premises to the plaintiffs, or consented thereto as is stated in the complaint or otherwise. The answer of the defendant further states and shows, that the defendant expressly denies that on the 13th day of March, A. D. 1850, or at any other time, the said David Olmsted in the complaint mentioned, was the attorney in fact of the said William G. Ewing, or that the said David Olmsted has any power, authority, or right whatever from said William G. Ewing to bargain or sell the said premises, or to make any contract, instrument, or agreement with the plaintiffs, or any one else, to sell and convey the said premises, as stated in the complaint or otherwise. And the defendant further denies that the said William G. Ewing executed or delivered to the plaintiffs, or either of them, the instrument in writing recited and stated in the said complaint, or any other instrument in writing for the purpose or of the tenor and effect in the complaint stated. And the defendant further states and shows that if any such instrument or agreement in writing as stated in the said complaint was executed or made by the said David Olmsted to plaintiffs at any time, the same was so executed and made by the said Olmstead, without any power or authority from the said Ewing to make the same, and without the knowledge or consent of the said William G. Ewing.

And the defendant further says, that he is now the owner, and seised of the aforesaid premises, and holds the legal title thereof.

Wherefore the defendant prays to be hence dismissed, and demands judgment against the plaintiffs for his costs of this action.

AMES & VAN ETTEN,
Defendants' Attorneys.

State of Indiana, County of Allen.

Byron D. Miner came personally before me, and being by me duly sworn, says that he is the defendant in the above entitled action in the above answer, that he has read the foregoing answer, and that the same is true of his own knowledge, except as to matters which are therein stated on his information or belief, and as those matters that he verily believes it to be true.

BYRON D. MINER.

Subscribed and sworn to before me, this 8th day of August, A. D. 1855.

[SEAL.] J. D. G. NELSON, Clerk.

A. C. C.

Territory of Minnesota,
District Court 2d District, County of Ramsey.

State of Indiana, County of Allen.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINER.

Byron D. Miner came personally before me, and being by me duly sworn, says, that he is the defendant in the above entitled action, and that he has fully and truly stated all the facts of the above entitled action to Mess. Ames & Van Etten, his council, by letter, as well as to other council of his, and that he is advised by them that he has a good and legal defence to the action, which he believes to be true; that he never had any knowledge or information, or notice whatever, that the above entitled action was commenced or pending against him, or that any suit or proceedings had been commenced against him by the above named plaintiff until he was advised of the pendency of the same about the first of June last, by a letter of private correspondence from a of his residing in the Territory of Minnesota. That he then immediately wrote to Messrs. Ames & Van Etten, attorneys at law at Saint Paul, Minnesota, retaining them as his attorneys and counsel, and requesting and instructing them to appear and defend the action.

And affiant further says that he never has taken or received, and does not take any newspaper printed or published within the Territory of Minnesota, and that he never has seen any summons or notice whatever published or printed in any newspaper or elsewhere of the commencement or pending of said action, and that he never has received any summons or copy of a summons or complaint of the plaintiffs in the above entitled action through the post-office or otherwise, or any notice of the pendency of said action whatever from the plaintiffs or their attorneys, or either of them. That he resides at Fort Wayne, in the State of Indiana, and has resided and been continually at that place for several years last past.

BYRON D. MINER.

Subscribed and sworn to before me the 8th day of August, A. D. 1855.

[Allen County Circuit Court Seal.]

J. D. G. NELSON,
Clerk A. C. C.

State of Indiana, wit:

I, E. A. McMahon, Judge of the 10th Judicial Circuit of Indiana, in which the county of Allen aforesaid is situate, hereby certify that J. D. G. Nelson, whose signature is officially appended to the foregoing affidavits, was at the time and now is Clerk of the Allen Circuit Court in said Allen County, that his attestation hereto is

made in due form of law, and that to such act by him as well as all other of his official acts are entitled to full faith and credit.

Given under my hand at the city of Fort Wayne, August 8th, 1855.

E. A. McMAHON,
Sole Judge of said Circuit.

Filed Nov. 24th, 1855. GEO. W. PRESCOTT, Clerk.

We hereby acknowledge due service of a copy of the within answer and affidavit on us at our office this 18th day of August, 1855.

WILKINSON, BABCOCK & BRISBIN,
Att'ys for Pl'ffs.

Territory of Minnesota,
District Court 2d Judicial District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
SIMON POWERS.

At Chambers, Nov. 8th, 1855.

Application having been made in behalf of the defendant above named on the 22d day of August, 1855, for leave to answer the complaint in this action and to defend the same, and Messrs. Ames & Van Etten, of counsel for defendant, having been heard for said application, and John B. Brisbin, of counsel for pl'ffs, having been heard in opposition, and due deliberation having been thereupon had.

It is ordered that said application be and the same is hereby denied with ten dollars cost to be paid by the said defendant to the pl'ffs, but without prejudice to a new motion in the same behalf.

M. SHERBURN, Judge.

Filed Nov. 24, 1855. GEO. W. PRESCOTT, Clerk.

Territory of Minnesota, District Court, 2d District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINOR.

County of Ramsey, *ss.*

William G. Ewing, junior, came personally before me, and being duly sworn says, that he is the agent of the above named defendant in this action, and that the said defendant has fully and fairly stated in writing the facts of this case to Messrs. Ames & Van Etten, his attorneys and counsel, and is advised by them that he has a good and legal defence to the action, which advice of said counsel affiant verily believes to be true.

WILLIAM G. EWING, JR.

Subscribed and sworn to before me, the 10th day of November, 1855.

PARKER PAINE,
Notary Public, County of Ramsey, M. T.

Filed Nov. 24, 1855. GEO. W. PRESCOTT, Clerk.

We admit service of a copy of the within affidavit upon us this 10th day of November, 1855.

[NOTARY SEAL.]

WILKINSON, BABCOCK & BRISBIN,
Att'ys for Pl'ffs.

Territory of Minnesota, District Court, 2d District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINOR.

On reading the answer of the defendant, duly verified, to the complaint of the plaintiff in this action, and the affidavit of William G. Ewing, junior, it is ordered that the plaintiffs, or their attorneys, show cause, if any exist, before me at my chambers, at the capitol, in the city of Saint Paul in the county aforesaid, on the 14th day of November instant, at ten (10) o'clock in the forenoon of that day, why leave should not be granted, and an order made in this case to allow the defendant to answer the complaint therein, and defend the action.

And it is further ordered that a copy of the defendant's answer, exhibited to me, and of the affidavit of Wm. G. Ewing, ju'r, together with a copy of this order, to be served upon the plaintiffs' attorneys forthwith, after the date hereof.

November 10th 1855. M. SHERBURN, Judge.

We hereby admit service of a copy of the within order upon us this 10th day of November, 1855.

WILKINSON, BABCOCK & BRISBIN,
Att'ys for Pl'ffs.

Filed Nov. 24, 1855. GEO. W. PRESCOTT, Clerk.

Territory of Minnesota, District Court, 2d District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINOR.
Order.

The application made on behalf of the above named defendant for leave to answer the complaint of the plaintiffs in the above entitled action, and to defend therein, came on to be heard before me on the 14th day of November, and upon reading the answer of the defendant, duly verified and produced, and the affidavit of William

G. Ewing, junior, and after hearing Messrs. Brisbin & Bigelow, counsel for the plaintiffs, in opposition to the application of the defendant, and Messrs. Ames & Van Etten, counsel in support of the same, on motion of Ames & Van Etten, attorneys for the defendant, it is ordered that the said defendants have leave, which is hereby granted, to answer the complaint in this action, and to serve copy of his answer upon the plaintiffs' attorneys within ten days from the date of this order, and that ten dollars costs be allowed to the plaintiffs to abide the final event of the action.

Dated November 22, 1855. M. SHERBURN, Judge.

We admit due service upon us of a copy of the within order, November 23d, 1855.

WILKINSON, BABCOCK & BRISBIN,
Pl'ffs' Att'ys.

Filed Nov. 24, 1855. GEO. W. PRESCOTT, Clerk.

Territory of Minnesota, District Court, 2d District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINOR.

The answer of Byron D. Minor, the above named defendant, to the complaint of the plaintiffs in this action, respectfully states and shows this court, that the defendant admits that William G. Ewing, now deceased, late of Fort Wayne, in the State of Indiana, was in his lifetime, and at the time stated in the complaint, seised in fee simple and the owner of the following described premises, viz: A certain lot or piece of land situate, lying, and being in the town of Saint Paul, in the territory of Minnesota, on the northwest corner of block number twenty-six (26), fronting on Robert Street fifty feet, and running back on Fourth Street one hundred feet more or less, being the same premises described in the said complaint. And that afterwards, on or about the 27th day of September, A. D. 1850, the said Ewing did convey the premises, piece and parcel of land aforesaid, to the defendant above named, by a good and sufficient deed of conveyance to pass the title thereof to the defendant. Which deed of the premises aforesaid from the said Wm. G. Ewing to the defendant, was duly recorded in the office of the Register of Deeds of the county of Ramsey, on or about the 18th day of October, A. D. 1850, in block "B," in pages 19 & 20. And the defendant further shows, that he purchased the premises above described, and received the deed thereof as aforesaid, and paid a full, fair, and adequate consideration and price for the same to the said Ewing, grantor, that is to say, sum of four hundred and fifty dollars, which was the full value thereof at the time, and so purchased the said premises, and received the title thereof from

the said Ewing, without any notice, knowledge, or information whatever, that the said plaintiffs, or either of them, had or claimed to have any title or interest in or to the said premises, or any lien thereof, equitable or otherwise, and without any notice or knowledge whatever that the plaintiffs, or either of them, had bargained or contracted for the said premises, as is stated in the said complaint, or otherwise. And the answer of the defendant further states and shows, that the defendant has not any knowledge or information thereof sufficient to form a belief whether that while the said William G. Ewing was seised of the premises aforesaid on the 13th day of March, A. D. 1850, or at any other time, one David Olmstead executed and delivered to the plaintiffs an instrument in writing as recited and stated in said complaint, or not.

And further states and shows that the defendant is informed and believes, and therefore admits it to be true, that the plaintiffs have been in possession of the premises described in the complaint, and that they have erected a building and improvements thereon, and that they use and occupy the same for business purposes. But the defendant says he has not any knowledge or information thereof sufficient to form a belief as to where or at what time the plaintiffs went into the possession or occupation of the premises aforesaid, or when they commenced making or made improvements thereon, or what amount they have expended in the erection of structure, building, or other improvements upon the said premises. And the answer of the defendant further states and shows, that the said premises mentioned in the complaint are not worth the sum of ten thousand dollars, but the defendant is informed and believes, and therefore says, that the said premises are worth the sum of about six thousand dollars, and no more, and defendant denies that the plaintiffs, or either of them, have ever paid or cause to be paid to the said William G. Ewing the sum stated in the complaint, as consideration or purchase-money for the said premises in the complaint mentioned, or any other sum whatever as stated in the said complaint or otherwise.

And denies that the said William G. Ewing has ever received any sum of money or other valuable consideration from the said plaintiffs, or either of them, for the said premises, or as consideration or purchase-money thereof; and denies that the said Ewing has at any time assented to or notified any act, deed, or agreement, for the sale of the said premises to the plaintiffs or consented thereto as stated in the complaint or otherwise. The answer of the defendant further states and shows, that the defendant expressly denies that on the 13th day of March, A. D. 1850, or at any other time, the said David Olmstead in the complaint mentioned, was the attorney in fact of said William G. Ewing, or that the said David Olmstead has any power and authority or right whatever from said William G. Ewing to bargain or sell the said premises, or to make any contract, instrument, or agreement with the plaintiffs, or any

one else, to sell and convey the said premises as stated in the complaint or otherwise, and the defendant further denies that the said William G. Ewing executed or delivered to the plaintiffs, or either of them, the instrument in writing recited and stated in the said complaint, or any other instrument in writing for the purpose, or of the tenor and effect in the complaint stated, and the defendant further states and shows, that if any such instrument or agreement in writing as stated in the said complaint, was executed by the said David Olmstead to the plaintiffs at any time, the same was so executed and made by the said Olmstead, without any power or authority from said Ewing to make the same, and without the knowledge or consent of the said William G. Ewing.

And the defendant further says, that he is now the owner seised of the aforesaid premises, and holds the legal title thereof. Wherefore the defendant prays to be hence dismissed, and demands judgment against the plaintiffs for his costs of this action.

AMES & VAN ETTEN,
Defendants' Attorneys.

Territory of Minnesota, County of Ramsey, *ss.*

William G. Ewing, Junior, came personally before me, and being duly sworn, says that he is agent of the defendant in the above entitled action; that he has read the foregoing answer, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he verily believes it to be true. And further says, that his knowledge and the grounds of his belief on the subject, are that most of the matters stated and contained in the foregoing answer are facts within his own personal knowledge; that he is the son of the said William G. Ewing mentioned in the complaint and foregoing answer, now deceased, who granted, sold, and conveyed the lots and premises described in the complaint and answer to the defendant, and that he (affiant) had a personal knowledge of the said sale and conveyance at the time the same was made as stated in said answer; that he knows the premises and lot of ground described in said answer, and the improvements thereon, and the circumstances under which the same are occupied by the plaintiffs; that he was informed by the said William G. Ewing in the answer mentioned, who stated to him at different times before his decease, and after the sale and conveyance by him of the said premises described in the answer to the defendants was made; that the said David Olmstead, in the complaint and answer mentioned, was not and had never been his attorney in fact, and that the said Olmstead never had any power or authority whatever from him, the said William G. Ewing, to bargain, sell, or convey the said premises described in the answer, or any real estate of his to the plaintiffs, or any other person, and which he (affiant) believes to be true.

And further says, that the defendant has stated to him personally at different times, the several matters contained in the foregoing answer, and that the same were all true.

And affiant further says, that the reason why this affidavit of verification is not made by the defendant, is that the said defendant is absent from the county and territory where his atttorneys in said action reside. WILLIAM G. EWING.

Subscribed and sworn to before me, the 10th day of November, 1855.

[SEAL.] PARKER PAINE,
Notary Public,
County of Ramsey, M. T.

We hereby admit due service upon us of a copy of the within answer this 10th day of November, 1855.

WILKINSON, BABCOCK & BRISBIN,
Att'ys for Pl'ff.

We hereby acknowledge due service upon us of a copy of the within answer and verification, this 23d day of November, 1855.

WILKINSON, BABCOCK & BRISBIN,
Pl'ffs' Att'ys.

Filed Nov. 24, 1855. GEO. W. PRESCOTT, Clerk.

Territory of Minnesota, County of Ramsey.

District Court, Second Judicial District.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINER.

The plaintiffs in their reply to the answer of the defendant in the above entitled action, allege that they have not sufficient knowledge or information thereof sufficient to form a belief as to whether the defendant paid to Wm. G. Ewing the sum of four hundred and fifty dollars, or any sum whatever, in consideration of the conveyance to him by the said Ewing of the premises described in the defendants' answer herein.

The pl'ffs further replying, deny that the sum of four hundred and fifty was a fair or adequate consideration or price for the premises described in said answer, and aver that the said premises, at the time of the alleged conveyance of the same to the def'ts, including the buildings, structures and improvements thereon at the time of such sale, were worth the full sum of two thousand dollars.

The pl'ffs further replying, allege that they are informed and believe, that at the time the defendant received a conveyance of the premises mentioned and described in his answer, he had notice that the pl'ffs claimed an interest in said premises, and that the pl'ffs had bargained and contracted for the same.

The pl'ffs further replying, allege that David Olmstead was authorized and empowered by Wm. G. Ewing to sell and contract for the sale of the premises mentioned in the complaint, and they deny that the defendant is the owner of said premises.

WILKINSON, BABCOCK & BRISBIN,
Pl'ffs' Att'ys.

Territory of Minnesota, County of Ramsey, *ss.*

Amherst Willoughby, of said county, one of the pl'ffs in the foregoing entitled action, being duly sworn, deposes and says, that the foregoing reply is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he verily believes it to be true.

AMHERST WILLOUGHBY.

Subscribed and sworn to before me this 13th day of December, A. D. 1855.

[NOTARY SEAL.] E. M. JATRIDGE,
Notary Public, M. T.

Service of a copy of the within admitted Dec. 14, 1855.
AMES & VAN ETTEN.

Territory of Minnesota, District Court, Second Judicial District, County of Ramsey.

AMHERST WILLOUGHBY AND SIMON POWERS
ag'st
BYRON D. MINER.

Gentlemen: You will please take notice that the issues joined in the above entitled action will be brought to trial at the next term of this court, to be held in the city of St. Paul, in said county, on the first Monday of June next, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Yours, &c., BRISBIN & BIGELOW,
Pl'ffs' Att'ys.

Dated St. Paul, M. T., May 21st, A. D. 1856.
To Messrs. AMES & VAN ETTEN,
Def'ts' Att'ys.

Service of a copy of the within notice is hereby admitted this 21st day of May, A. D. 1856. AMES & VAN ETTEN,
Defendant's Attorneys.

District Court, Second District, County of Ramsey. June 3, June General Term, A. D. 1856, third day.

WILLOUGHBY and POWERS
against
BYRON D. MINER.

On the application and affidavit of the defendant it is ordered that this cause stand continued a true record.

Attest: GEO. W. PRESCOTT, Clerk.

A true transcript of the record in the minutes of the Court.
Attest: GEO. W. PRESCOTT, Clerk.

At a term of the District Court of the Second Judicial District of the Territory of Minnesota, held in and for the county of Ramsey, on the 14th day of June, 1855. Present—Hon. Moses Shurburne, Judge.

AMHERST WILLOUGHBY and SIMON POWERS
ag'st
BYRON D. MINER.

On reading and filing due proof of the service of the summons in this action by publication, pursuant to an order of the Judge of this court, heretofore duly made herein, and also due proof that more than twenty days have elapsed since the expiration of the time prescribed in said order for the publication of said summons, and that no answer or demurrer to the complaint in this action has been received by the plaintiffs' attorneys; and, on inspection of the said summons and complaint, it is ordered, on motion of H. R. Bigelow, of counsel for plaintiffs, that it be referred to George W. Prescott, Esq., of the city of St. Paul, in the county of Ramsey, to take proof of the facts and circumstances stated in the said complaint, and of the demand mentioned therein, and to report such proofs and examinations to this court with all convenient speed; further ordered, that the said referee do examine the plaintiffs, or one of them, or their agent, on oath, respecting the facts and circumstances, and the demands mentioned in said complaint.

M. SHERBURNE, Judge.

Filed June 14, 1855.

GEO. W. PRESCOTT, Clerk.

Territory of Minnesota, District Court, 2d Judicial District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINER.

Testimony of David Olmstead, a witness in the above entitled cause, taken on behalf of the plaintiffs pursuant to the annexed order of court in answer to verbal interrogatories proposed on the part of said plaintiffs this 2d day of August, A. D. 1855. The said David Olmstead, being on that behalf duly sworn deposes and says: I reside at Winona, Min. Ter. During the years 1849 and 1850 I resided partly in St. Paul and partly at Long Prairie. I knew Richard Chute and Wm. G. Ewing in 1849. Ewing then resided at Fort Wayne, Indiana; in 1849, about the 7th August, he purchased of myself and Henry C. Rhoades several lots of land in St. Paul; he had a general agent, and it was Richard Chute. Mr. Chute was general superintendent of Mr. Ewing's busi-

ness on the Mississippi and Missouri Rivers, bought and sold land for him, made contracts for him. [The paper annexed to this deposition, marked Exhibit "A," shown to witness.] I know this handwriting; it is Richard Chute's. This paper was executed by Chute, and delivered to me at the time it bears date. (The paper annexed, and marked Exhibit "B," shown to witness.) I executed this instrument at the time it bears date for myself and as the attorney of Wm. G. Ewing, and the land described in this is a portion of the same land which I and Henry C. Rhodes conveyed to Ewing August 7th, 1849. Mr. Chute bought the land for Ewing, did the business as Ewing's agent. The consideration in this bond to Willoughby and Powers of three hundred dollars and interest was paid by Willoughby at the time it came due by the terms of the bond. Had a conversation with Ewing after the bond was made and before the consideration was paid. He said he would give a deed, that the consideration was too small, and he wanted to get the land back from Willoughby, but if he could not get it back he would give a deed. David Day was Register of Deeds of Ramsey County on the 25th of June 1850. This is his signature on the back of the bond. I think three hundred dollars was a fair price for the property at the time the bond was made; it was considered a high price at the time Willoughby and Powers went into possession of the property, between the time the bond was made and the time when it became due. They built a large barn and livery stable on the premises that spring. I should think the value of the property now, including the improvements, was 6 or 7 thousand dollars; they made the improvements, and have been in possession and actual occupation of the property since that time, are still in possession. William G. Ewing died about a year since.

DA'D OLMSTED.

Subscribed and sworn to before me, this 2d day of August, A. D. 1855.

GEO. W. PRESCOTT,
Clerk of District Court and Referee in said cause.

Saint Paul, August 9th, 1849.

David Olmsted, Esq.—

D'r Sir: You are hereby constituted my agent to lease and collect rents on my property in Saint Paul, and on land in its vicinity. You are also constituted agent for the sale of the same.

Yours resp'y,
WILLIAM G. EWING,

By RICH. CHUTE.

"Exhibit A."

Know all men by these presents, that we, William G. Ewing, of Fort Wayne, in the State of Indiana, and David Olmsted, of Long Prairie, in the Territory of Minnesota, are held and firmly bound

unto Amherst Willoughby and Simon Powers in the sum of five hundred dollars, lawful money of the United States, to be paid unto said Willoughby and Powers, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators firmly by these presents, sealed with our seals, dated the thirteenth day of March, A. D. 1850. Whereas, the said William G. Ewing hath agreed to sell and convey to the said Willoughby and Powers a certain lot or piece of land situate, lying, and being in the town of Saint Paul, in the Territory of Minnesota, described as follows, to wit: Being a piece of land on the northwest corner of block twenty-six (26), fronting on Robert Street fifty feet (50), and running back on Forth Street one hundred feet more or less; and the said Willoughby and Powers, in consideration thereof, have given to the said William G. Ewing their note of hand for the sum of three hundred dollars and interest payable on or before the first day of September, A. D. 1850. Now the conditions of this obligation is such that if after the payment of the said note, and at the request of the said Willoughby and Powers, the said William G. Ewing shall make and execute to the said Willoughby and Powers, their heirs and assigns, a good and sufficient deed of conveyance of the said premises, and shall permit the said Willoughby and Powers, their heirs and assigns, to receive and take to their own use the rents and profits of the premises until such conveyance shall be made and executed as aforesaid, then this obligation to be void, otherwise to remain in full force and virtue. Signed and sealed at St. Paul, in the Territory of Minnesota, on the day and year first above written. DA'D OLMSTED, [SEAL.]
WILLIAM G. EWING, [SEAL.]
By DA'D OLMSTED, his Att'y in fact.

In presence of the (words "is such" interlined before signing.)
L. A. BABCOCK.

"Exhibit B."

Office of Reg. of Deeds.

Ramsey Co., M. T., *ss.*

I do hereby certify that the within bond was filed for record in this office on the 25th day of June, A. D. 1850, at 7 o'clock A. M., and duly recorded in Book A, of bonds, pages 11 and 12.

D. DAY, Reg. of Deeds.

Territory of Minnesota,
District Court 2d District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINER.

Continuation of testimony of David Olmsted under a pursuance to order of court, being continued from August 2, 1855, to this 26th day of August, A. D. 1857.

David Olmsted being by the referee first duly sworn, in answer to cross-interrogatories verbally interposed by defendant's counsel, deposes and says: William G. Ewing, mentioned in my direct testimony, is now deceased. He died in July or August, 1854. He resided at that time in Fort Wayne, Indiana. He was never a permanent resident of this territory; was here for several weeks on business in the summer of 1850. He was not in the territory at the time of the execution of the bond marked Exhibit "B" hereto annexed, and never had been up to that time. I never had any conversation with him personally in relation to the bond mentioned in the bond previous to its execution, only with his agent Chute. The letter hereunto annexed marked Exhibit "A" is the authority under which I executed the bond to Willoughby and Powers, and is the only written authority I had for executing it. The consideration mentioned in the bond was not paid to me personally. None of the consideration money mentioned in it was paid to me. I think I was present, but am not positive when the money was paid to Mr. Babcock, and understood from the conversation at that time it was to pay for the land. I think the conversation was between Mr. Willoughby and Mr. Babcock. Wm. G. Ewing was not present at that time, my impression is he had left the territory before that time, temporarily. I think the money was paid the day before it was due. I know it was paid before it was due, and think it was one day before. I had a conversation with Mr. Ewing about this lot after the bond was given. He expressed no dissatisfaction with me for making the sale, but said in effect he was sorry I had sold it. He never in my presence expressed an aversion to ratifying the sale, but would rather not sell it. Had more faith in St. Paul property since coming up. He talked in my presence as though he considered it binding morally or legally, I don't know which; and said if he did not succeed in leasing it to them he would give a deed; from what he said in general, he would rather have had the lot than the money. Never found any fault with my sale; on the contrary, from his general conversation he expressed approval. I said to him, on one occasion, I was told he had refused to give a deed. He denied the statement to me, and said if he could not get them to take a lease he would give them a deed. This, I think, was in the month of June, before the note became due. I never conversed with him about the land after I knew he had sold it to defendant.

Redirect examination by Plff's Counsel.

I had possession of the note spoken of given at the same time as the bond, and gave it to Mr. L. A. Babcock for collection. I was present in Mr. Babcock's office when he opened a letter from Mr. Ewing, in which Ewing requested the number of the Willoughby and Powers lots, so that he might make out a deed to them. It was in July or August, 1850, I think.

X-examination resumed.

I think Mr. Babcock was at that time Mr. Ewing's legal adviser and attorney in this Territory.

Redirect Examination.

I was agent for G. W. & W. G. Ewing, and did a large amount of business for them from the fall of 1846 till some time in 1848; I did all my business with them through Mr. Chute; in 1848 I went into partnership with them in business connected with the Indian trade. HENRY C. RHODES.

X-examination.

W. G. & G. W. Ewing and myself constituted the partnership under the firm name of Olmsted & Rhodes. Mr. Chutes was not one of the firm; G. W. and W. G. Ewing had one-third interest in the profits and loss originally. The business of the partnership was principally a merchandising trade with the Indians and whites; we did other business incidentally. The buying and selling of real estate was not expressed in any agreement as a part of our business; am not aware that during that partnership, any real estate was bought by the firm, nor any sold; I never had any power of attorney or authority in writing from Wm. G. Ewing to sell real estate; I had never known him in any business transactions personally, only through Mr. Chute. DA'D OLMSTED.

Sworn to and subscribed before me, August 26th, 1857.

GEO. W. PRESCOTT, Clerk and Referee in said action.

Territory of Minnesota, District Court, 2d Judicial District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINER.

It is hereby mutually stipulated and agreed by and between the undersigned attorneys of the respective parties, that the above and foregoing deposition of David Olmsted, a witness examined on the parts of the plaintiffs, may be admitted and read, in evidence upon the trial of the above action, hereby saving and reserving to each of the parties and their attorneys, the right to object to the competency of any portion or portions of said deposition as evidence upon the trial in the same manner and with the same effect, as objections might be made if the witness was examined in open court.

Dated, August, 26th, 1857.

AMOS VAN ETTEN and OFFICER,
Deft's Atty's.

BUSBIN & BIGELOW,
Atty's for Pl'ffs.

To the Honorable Judge of the District Court, Ramsey County.

I hereby report the foregoing as the testimony of David Olmstead, a witness produced before me on behalf of the plaintiffs in the cause herein entitled, and sworn, and examined by me pursuant to the foregoing order of court, on the 2d of August, A. D. 1855, which examination was continued to the 26th day of August, 1857, by consent and written stipulation of H. R. Bigelow, attorney for plaintiffs, and M. E. Ames attorney for defendant, which written stipulation is annexed hereto. I further report that the testimony of the witness was reduced to writing by me as the same was given—was then read to witness and thereupon subscribed by him. GEO. W. PRESCOTT, Referee.

District Court, 2d District, County of Ramsey, Oct. 26, October Term, A. D. 1857, 13th day.

AMHERST WILLOUGHBY and SIMON POWERS } against BYRON D. MINER. }

Ordered by consent of parties in open court, that this cause be referred to George W. Prescott, who is hereby appointed a referee to take all the testimony of the parties and their witnesses herein, and is directed to report the same when thus taken to this court. A true record.

Attest, GEO. W. PRESCOTT, Clerk.

A true transcript of the record in minutes of court.

Attest, GEO. W. PRESCOTT, Clerk.

Territory of Minnesota, District Court, Second Judicial District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS } against BYRON D. MINER. }

Testimony of witnesses produced, examined, and sworn by and before Geo. W. Prescott, a referee therefor appointed, at his office, being the clerk's office of said District Court, in the capitol building at Saint Paul, in said County, this 16th day of February, A. D. 1858.

Horace R. Bigelow, Esq., appeared for plaintiffs, and M. E. Ames, Esq., appeared for defendant; and thereupon Richard Chute, being by said referee first duly sworn, in answer to verbal interrogatories by plaintiffs' counsel, deposes and says:—

I am acquainted with the parties, Willoughby and Powers, and Byron D. Miner. In the spring of 1850 I was in partnership with W. G. & G. W. Ewing, and the firm was "Ewing, Chute & Company." Prior to that time I had been a partner of Wm. G. & G. W. Ewing; since August, 1845, and for four years and four months

previous to that time, I had been a clerk for W. G. & G. W. Ewing. I was doing business for the firm of W. G. & G. W. Ewing all the time up to 1850, for which they paid me a salary.

(This testimony was all objected to by defendants' counsel, and taken subject to such objection.)

Question by pl'ffs' counsel. What was the character of the business you were doing for W. G. & G. W. Ewing, and what was your authority?

(Objected to by def'ts' counsel.)

Answer. Up to 1845 I was engaged as agent for them in buying furs and skins during the fur season, and in the summer and fall of each year I was generally engaged west of the Mississippi, in looking over their Indian trade. From 1845 to 1850 my summers and falls, and part of some of the winters, were spent in looking after their Indian trade. I also attended to any other business of theirs that required looking after, no matter what kind it was; there was hardly a day in the year that I was not attending to some business of theirs, looking after their law matters and anything else. I considered myself their confidential clerk, and if there was anything to be done I went and done it. William G. Ewing and George W. Ewing composed the firm of "W. G. & G. W. Ewing."

Question by pl'ffs' counsel. Are you acquainted with the premises in this city on the corner of 4th and Robert Streets, where Willoughby & Powers stable stands?

Answer. I am.

Question by same. Do you know whether William G. or George W. Ewing ever had any interest in it?

(Objected to by def'ts' counsel.)

Answer. I do; in 1849 I bought the premises, with some other property of Olmstead & Rhodes, for the said firm of W. G. & G. W. Ewing, and took the title to Wm. G. Ewing; Olmstead & Rhodes were owing W. G. & G. W. Ewing for goods furnished them to prosecute the Indian trade, and I bought this property to apply upon their indebtedness, which was so applied. (All of foregoing answer taken subject to objection.)

Question. Why was the title taken in the name of William G. Ewing?

(Objected to by def'ts' counsel.)

Answer. It was taken in William G. Ewing's name for the sake of convenience in selling.

Question. Was it the frequent practice in their land transactions to take the title to property purchased by the firm in the name of one or other of them?

(Objected to.)

Answer. It was frequently the case in their business.

Question. State whether in the spring of 1850 or prior thereto

you received any instructions from them or either of them in relation to this property? and if so, what?

(Objected to.)

Answer. I received no specific instructions in regard to this particular piece of property, but received general instructions by letter from George W. Ewing. (Here the counsel for the defendants inquires whether witness has the letter present, and asks to have the same introduced, and objects to all evidence concerning its contents.) Answer. No; I have not got the letter, and don't know where it is.

Question by pl'ffs' counsel. State whether you anything of where the letter or what has become of it.

(Objected to.)

Answer. I don't know where the letter is, unless it is among some private papers nailed up in a box at Fort Wayne, Indiana.

Question. Will you state were the contents and purport of that letter?

(Objected to.)

Answer. It was a long letter in regard to the business of W. G. & G. W. Ewing generally, and more particularly in regard to their business in Minnesota. In that letter I received general instructions to sell all the property they had in Minnesota. They complained that their business here had been adverse to them.

Defendant's counsel further object that no notice has been given to defendant or defendant's counsel to produce the letter in question.

Plaintiffs' counsel consent that defendant may produce the letter without notice; whereupon, defendant's counsel responds, that the same appears to be in possession and under control of witness, all which is here reduced to writing by the referee at the special request of the several counsel.

Exhibit "A," attached to deposition of David Olmstead, as taken August 2, 1855, is shown to witness, and pl'ffs' counsel asks as follows:—

State whether you executed this paper, and if so, in what capacity?

(Objected to by defendant's counsel.)

Answer. I did execute it. I executed it as agent for W. G. & G. W. Ewing.

Question. Was it executed before or after you received that letter of instructions already mentioned?

(Objected to.)

Answer. It was executed after receiving that letter.

Question. Who composed the firm of Olmstead & Rhodes at the time of the purchase from them already spoken of?

(Objected to.)

Answer. David Olmstead and Henry C. Rhodes.

Exhibit "B," attached to deposition of David Olmstead before mentioned, is shown to witness, and question is asked by pl'ffs' counsel:—

Is the property described in that instrument a portion of the property purchased by you for the firm of W. G. & G. W. Ewing of Olmstead & Rhodes?

(Objected to.)

Answer. It is.

Question. State whether you had any conversation with W. G. Ewing about that bond in the summer of 1850, and if so, state when and what it was.

(All objected to.)

Answer. In June and July, 1850, I had several conversations with Wm. G. Ewing relative to this bond, and the sale of the premises therein described, to Willoughby and Powers. He appeared to be vexed about the sale, and said that the property had been fooled away; that he did not think that Willoughby and Powers could compel him to make a deed; that he meant to make them take a lease of the premises on a long time, instead of the deed. I told him that he ought to make a deed of the property; that it had been sold in good faith, in pursuance of the instructions. He replied that he would make a deed when he was compelled to. I recapitulated to him the circumstances under which the property was bought, and the instructions I had received from his brother about selling everything they had up in Minnesota, and winding up the business; that I had done business for them some nine years, and this was the first time he had refused to ratify what I had done; that I had been told by him frequently to exercise my own judgment in regard to any of their business, and must assume responsibility sufficient to carry it out; and if he now backed down from this trade, I should not, as I had heretofore, assume responsibility in the transactions of their business. To this he replied: "Well, we will see, and try and fix it some way; I guess they will take a lease." He said he had a lease drawn up for them, and guessed they would take it. That's about the substance of our several conversations.

Question. Do you know whether the purchase price of this property has been paid by Willoughby & Powers?

(Objected to.)

Answer. In the month of September or October, 1850, Mr. L. A. Babcock told me he had some money from Mr. Ewing. I asked what it was for. He said that it was money that Willoughby & Powers had paid for the lots they had bought. I told him I did not like to receive it; that the judge, William G. Ewing, was mad about the trade. He replied there would be no further difficulty about it, that Wm. G. Ewing had agreed to give a deed, and had either taken one home or had sent for one for him and his wife to sign. I then took the money, something over three hundred dollars, and gave the receipt therefor to Mr. Babcock for Wm. G. & G. W. Ewing. I suppose I signed it W. G. & G. W. Ewing by Richard Chute.

Question. Were you acquainted with the value of real estate in St. Paul in the spring of 1850?

(Objected to.)

Answer. I was, to some extent.

Question. What, in your opinion, was was the value of the property described in the bond, on the 13th of March, 1850?

(Objected to.)

Answer. About three hundred dollars. I have known the defendants about 18 years.

Question. What was the business the defendant was engaged in in September, 1850?

(Objected to.)

Answer. He was clerk for the firm of Ewing, Chute & Company, and W. G. & G. W. Ewing, to the best of my recollection.

Question. In what business had he been engaged, principally, for a long time previous to Sept., 1850?

(Objected to.)

Answer. During most of the time for ten years previous to Sept., 1850, he had been engaged in buying furs and skins for Ewing, Edsall & Co., W. G. & G. W. Ewing, and Ewing, Chute & Co.

Question. State whether his connection with W. G. & G. W. Ewing continued until Sept., 1850, and if so, how long?

(Objected to.)

Answer. He was the clerk of Ewing, Chute & Co., up to July 4, 1854. Since that time he has been engaged in settling up the old business of W. G. & G. W. Ewing, Wm. G. Ewing having died July 11, 1854, and part of the time has been in partnership with Geo. W. Ewing.

Witness cross-examined by the defendant's counsel, deposes and says:—

My partnership with Wm. G. & Geo. W. Ewing commenced in August, 1845; that partnership continued up to July 4, 1854.

Question. What was the character and purposes of your co-partnership?

(Objected to by pl'ffs' counsel.)

Ans. It was for purposes mainly of buying furs and skins, western produce, and furnishing Indian goods to parties east of the Mississippi River. I came to reside in Minnesota in November, 1854. David Olmsted and Henry C. Rhodes composed the firm of Olmsted & Rhodes in the year 1849.

Question. State whether you ever at any time received or had any power of attorney, or other instrument in writing, authorizing you to sell or convey any interest in lands belonging to William G. Ewing?

Answer. I received one power of attorney to convey property at Ashkosh, Wis., which belonged to Ewing, Chute & Co., the title to which was in Wm. G. Ewing. This was in 1847 or 1848, some time along there; at another time, Wm. G. Ewing gave me a power of attorney, signed W. G. & G. W. Ewing, to sell some property in

Whitney County, Indiana. I don't know when this was—some time between 1848 & 1850, I think. These were the only powers of attorney given me, to convey real estate, by him that I can remember now. The first distinct recollection I have of any conversation with Wm. G. Ewing about this land in controversy was in June, 1850, at the Central House, in St. Paul. This was after Mr. Olmsted had made a negotiation to sell to these plaintiffs; Mr. W. G. Ewing then expressed his entire disapprobation of the bargain Olmsted had made for the sale of the lots in question in this action. In this first conversation Mr. Ewing said he would not ratify the bargain Olmsted had made. He said the title was in him if they could get a deed, let them get it, he would not give it them. He denied that any body had any authority to sell his property; said that the title was in him, and if anybody could get a deed, let them get it. He said this in reference to this property. I remarked to him that his brother had directed the sale of all their property in Minnesota. He said he did not care, that the title was in him, and nobody had a right to sell his property. Have known the defendant, Byron D. Minor, 18 years. I think he is in partnership with Geo. W. Ewing. He told me he was when he was up here last fall. I should think he was about 38 or 40 years old. He transacts business on his own account.

Question. Is he regarded and reported to be a good business man?

Answer. He is.

Question. Is he a man of reputed wealth and means?

Answer. I suppose he is worth from six to ten thousand dollars independent of this property in controversy. I never received any money myself from these plaintiffs, Willoughby and Powers, directly; I don't know that any purchase money was ever offered or tendered to Wm. G. Ewing for this property; I took it home and charged myself with it on the books of W. G. & G. W. Ewing.

Amherst Willoughby, a witness produced by and on behalf of the plaintiffs in this action, being by the referee first duly sworn, in answer to verbal interrogatories proposed by plaintiffs' counsel, deposes and says as follows:—

I am one of the plaintiffs in this action. Exhibit "B" attached to the deposition of David Olmstead before alluded to, shown to witness. I am acquainted with the premises described in that bond.

Question. Who is in possession of these premises?

(Objected to.)

Answer. I am in possession of them, and have been since 1850.

Question. Are these buildings upon the premises?

(Objected to.)

Answer. There are; they were commenced in May 1850, by Willoughby and Powers.

Question. What improvements were put upon the premises by

Willoughby and Powers in May, 1850, and from that time to September, 1850?

(Objected to.)

Answer. From the 1st of May, 1850, to the 1st of July, 1850, we put on a stable 32x36 feet, 2 stories high, and furnished it all off, and finished the upper part into two dwellings, for two families to live in, the rooms lathed and plastered. We moved our families into the upper part the 1st day of July, 1850; I lived there four years, and Mr. Powers three years from that time; the whole building was all completed by the 15th of July, 1850; that building is still there.

Question. What was the cost of the building put on between the 1st of May and September, 1850?

(Objected to.)

Answer. It cost us a little rising $1,700 00.

Question. State whether at the time the bond exhibit "B" was given, you executed any paper to Mr. Ewing, and if so, what?

(Objected to.)

Answer. We, Willougby and Powers, gave our joint note for $300, payable on the 1st of September, 1850.

Question. State whether you paid that note, and if so, where and to whom?

(Objected to.)

Answer. I paid that note on the 20th day of August, 1850, ten or eleven days before it was due, to L. A. Babcock.

Question. Were you acquainted with the value of real estate in St. Paul at that time, in the spring of 1850?

(Objected to.)

Answer. I was.

Question. What was the value of that property in March, 1850, before any improvements were made on it?

(Objected to.)

Answer. Two hundred and fifty dollars was supposed to be a big price for it.

Question. About what was the value of the lot and improvements on it in March, 1855?

(Objected to.)

Answer. It was then worth, with the improvements on it, five thousand dollars; I could have got $5,000 00 for it had I had the title.

Question. Did you have any conversation with Wm. G. Ewing about this purchase prior to September, 1850, and if so, where and what was it?

(Objected to.)

Answer. In June, 1850, I had several lengthy conversations with Mr. Ewing with reference to the purchase of this lot; I think I had conversations with him every day for at least a week; our conversations were mostly with reference to this lot; he wanted to buy it

back; wanted me to give it up again; he offered me eight hundred dollars for the lot, and a lease of the same for the period of ten years; at the expiration of ten years to have what buildings remained on the lot, if we would relinquish our claim to the same; I refused to do anything of the kind; he said he had left the lease with Mr. Babcock, and presumed I would sign it, and give him back the property, which I utterly refused to do.

Witness cross-examined by defendants' counsel, deposes and says:—

I delivered the note I have spoken of to David Olmsted; I gave it to him 10th March, 1850. It was for 300^{00}, payable on or before the 1st day of September; I was in Mr. Olmsted's office when I gave the note. His office was in St. Paul, on 3d Street; a man by name of Walter Gardner was present for one, Mr. Powers for another, Mr. Babcock for another; when I gave the note, Mr. Olmsted (David) wrote the note; I delivered it to Mr. Olmstead at that time; Wm. G. Ewing was not present at that time, neither Wm. G. or Geo. W. Ewing was in the territory at that time to my knowledge; I did not know them; I don't know where they resided; did not know them at that time; had never seen them.

The first conversation I had with Wm. G. Ewing was the 16th of June, after I had made the contract with Mr. Olmsted; that was the first time I had ever seen Wm. G. Ewing; I don't know whether or not Wm. G. Ewing had an attorney at law in St. Paul, a legal adviser at that time.

L. A. Babcock, a witness, produced on behalf of plaintiffs, being by the referee first duly sworn in, answer to verbal interrogatories proposed by the plaintiffs' counsel, deposes and says as follows:—

I am acquainted with the plaintiffs, and with the premises in question.

Question. Were you the agent of William G. Ewing, in the spring or summer of 1850.

(Objected to.)

Answer. In March, 1850, I was called upon by David Olmsted, and requested to draw a bond, which is schedule "B" in his testimony. I drew the bond. It was executed in my presence. He then stated that he wanted to employ me to look after Mr. Ewing's property. (This testimony as the foregoing, objected to as being conversations between third persons not privy to the grantor nor parties to the suit.) He wanted I should, and I did take charge of certain houses and lots in St. Paul belonging to the Ewings. He also left the note with me which was given by Willoughby and Powers for the purchase of this property, for collection as agent of the Ewings.

Question. State whether you ever did anything under their authority; and if so, whether it was ever brought to the knowledge of the Ewings, or either of them.

(Objected to as irrelevant, because the question relates to other

transactions not connected with the subject matter of the suit, but relates to transactions with third parties, and because it does not appear that the def'ts' grantor was present or privy to any such arrangement.)

Answer. Under that authority I received the note spoken of, and collected rents for their buildings until June, 1850, when Wm. G. Ewing came to St. Paul, Mr. Ewing called on me.

The defendants' counsel here object to any more testimony on the part of witness, on the ground that he was the attorney at law and legal adviser of Wm. G. and G. W. Ewing during the spring and summer of 1850, and that all information and conversations received by or had by him were communicated to him professionally as such attorney, and, therefore, privileged from disclosure; and ask to propound to witness the following interrogatories:—

State whether you was the attorney at law and legal counsel of Wm. G. Ewing during the spring and summer of 1850.

The referee notes the objections, and without putting the question to the witness, allows the plaintiff to proceed with his examination.

Question by plaintiff's counsel. Was what you had done, as you have stated in above, then brought to the knowledge of Wm. G. Ewing?

(Objected to by def'ts' counsel.)

Answer. It was.

Question. State whether he by any of his acts, then recognized you as his agent under the appointment of Olmsted; and if so, what those acts were?

(Objected to as leading, and on grounds above named.)

Answer. He did; and the acts by him were, looking over my account, settling them up to that date, and giving me a power of attorney in fact, to do the same thing Olmsted had employed me to do, but not including anything in relation to this note.

Question. What did you do with this note?

(Objected to as before.)

Answer. At or about the time it became due I received the money from the plaintiffs and paid it over to Mr. Chute and took his receipt. I paid it to Mr. Chute for the Ewings, and took a receipt signed by Chute for the Ewings. (Objected to on grounds the receipt should be produced.) I do not know what became of the note.

Question. When was the first time you ever saw William G. Ewing?

(Objected to.)

Answer. The first time, I think, was in June, 1850. I have no recollection of ever seeing him before.

Question. State what the nature of your employment by Mr. Ewing was at that time.

(Objected to as irrelevant.)

Answer. I was employed as the agent and attorney in fact of William G. Ewing in June, 1850. I had a power of attorney in fact of for part of what I was to do in writing, and verbal instructions as to other things.

Question. What were your verbal instructions?

(Objected to as occurring at a subsequent time and irrelevant.)

The witness here makes the following statement: Before Ewing left here, in June, 1850, he gave me certain instructions in relation to this property in question, certain verbal instructions. He also left a letter giving me written instructions in relation to it, in which he said that he wanted I should act as his attorney in this matter. Now I am willing to answer any further questions in the case subject to the ruling of the court whether they are privileged or not.

(The defendant's counsel objected to the foregoing statement on the ground that is revealing confidential communications received by him as the attorney at law and legal adviser of Wm. G. Ewing, and also because they are irrelevant and immaterial, and statement was made after subject to such objection.)

Question by pl'ffs' counsel. State whether, as his attorney in fact, you had from him any verbal instructions at that time relative to this note or these promises; and if so, what?

(Objected to for the same reason above noted.)

Answer. I had, as attorney in fact, instructions to present a lease which he left with me to Willoughby & Powers, and have them execute it if they would, and if they executed it to retain the note until further orders if they did not execute the lease. I was to receive the money on the note if they paid it.

Question. What did you do under these instructions?

(Objected to as before noted.)

Answer. I presented the lease and they refused to accept it or sign it. Paid me the money on the note at or about the time it fell due, of which fact I notified Wm. G. Ewing by letter, directed to Ft. Wayne, and that I had paid it to Mr. Chute, and also told him that Willoughby & Powers wanted the deed. (All this relating to letter objected to as giving verbal evidence of contents of a written instrument.) The receipt of my letter was acknowledged by either Wm. G. Ewing or G. W. & W. G. Ewing, I cannot tell which. I have not the letter, and am unable to find it. I have looked for it very diligently on several occasions. The last occasion was to-day. It contained instructions to fill up a deed of this land to Willoughby & Powers, and send to them, which I did. My impression is that this was the last of September or first of October, 1850. I cannot tell which. (All this testimony relative to contents of letter taken subject to objection.) I have resided in St. Paul since July, 1849. Was acquainted to some extent with the value of real estate here. Consider the value of the lot in controversy in March, 1850, was about $300 00. Improvements were commenced on the lot, I think, in the spring or early in the summer of 1850."

Question by pl'ffs' counsel. State whether the verbal instructions relating to this note and these premises were given you by Wm. G. Ewing before or after your first employment by him as his attorney at law or legal adviser.

(Objected to by def'ts' counsel.)

Answer. "They were given before such employment in the month of June, 1850, on or before the 20th of the month.

Question. State whether you have the receipt spoken of by you for the money paid to Mr. Chute for the Ewings?"

(Objected to.)

Answer. "I suppose I had it, but have made diligent search for it to day and cannot find it."

Witness cross-examined by the defendants' counsel.

Question. When did you first become the general attorney, counsellor at law, and legal adviser of Wm. G. Ewing?

Answer. "I cannot say as I ever did become his general attorney and legal adviser. I was employed in two or three perhaps more special cases.

Question. "Where was you first employed by Wm. G. Ewing in his general business?"

Answer. "I am not aware that I was ever employed as his attorney in his general business, only his special attorney in special business here in St. Paul and vicinity."

Question. "Was you not the general attorney of Wm. G. Ewing in his business in Minnesota, and acting in relation to this property in June, 1850?

Answer. "As I said before, I am not aware that I was his general attorney in any respect."

Question. "Were you not employed in the month of June, 1850, to recover this property in controversy from Willoughby and Powers?

Answer. "I was not employed to recover this property by suit in any manner, but to induce them to accept a lease."

(Here the counsel for the defendant objects to the answer of the witness because it is evasive and not responsive to the question.)

Question. "Did you not charge to and render a bill of to Wm. G. Ewing of date June 28, 1850, a retainer fee of fifteen dollars, to recover possession of the Willoughby & Powers livery stable lot in controversy?

"I did but it was to recover possession by their receiving a written lease."

Question. "State whether you was the attorney at law of Wm. G. & G. W. Ewing, to recover the possession of this property of Willoughby & Powers in June, 1850."

Answer. "After and at the 28th day of June, 1850, I was the attorney at law of Wm. G. Ewing, to recover possession of this property, but not by suit at law."

Question. Did you not charge W. G. Ewing a retainer fee of

fifteen dollars the 28th of June, 1850, for retainer to recover possession of this lot in controversy?

Answer. "I did."

Question. "Has it been paid, and by whom?"

Answer. "It was paid in settlement of Wm. G. & G. W. Ewing and Ewing, Chute & Co.'s accounts with me by Geo. W. Ewing." "It was paid as a retainer fee for services to recover their possession of this property from Willoughby & Powers, as I stated before."

Question. Are you one of the attorneys of record in this cause of Willoughby & Powers, the plaintiffs, to recover this lot of the defendant?

Answer. "I cannot say as I am; if my name appears as an attorney of record, it was used by some of my partners.

Question. "Was it used without your knowledge or approbation?

Answer. "It was used without my knowledge."

Question. "Are you one of the original attorneys of record for the plaintiffs in this cause?"

Answer. "It appears from the papers that I am."

Question. How long was it after you charged Wm. G. Ewing fifteen dollars retainer *fee* to get possession of this lot in controversy from Willoughby & Powers before you commenced this suit for them?

Answer. I never commenced this suit for them personally; I don't know when this suit was commenced; I was a member of the firm of Wilkinson, Babcock & Brisbin, on the 19th of March, 1855, and for some time before that and until 1st of May following, when Mr. Brisbin withdrew and took the papers in this case as a portion of his share in the business. The firm were practising attorneys in this city. I charged W. G. Ewing the further sum of fifteen dollars besides the retainer fee, for services to get possession of the lot from Willoughby & Powers, and it was paid in the same manner as I have described before.

Question. Is the bill here presented an original one, or a true copy of your bill rendered by you to Wm. G. Ewing from your retainer and services?

Answer. The bill which I handed you, and which I now have in my possession, is a copy of the original one, by me rendered to Ewing, Chute & Co.; it is headed Ewing, Chute & Company.

Here the defendants' counsel asks that the same be put in evidence.

The witness refuses to part with possession of the bill because it is his private property, and contains a receipt of his settlement of account with Ewing, Chute & Company.

Question. At what time was you first employed by Wm. G. & Geo. W. Ewing to transact their business?

Answer. I was first employed by David Olmsted to transact certain business for them in March, 1850; and was continued per-

sonally by Wm. G. Ewing early in June, 1850, but was never employed to transact their general business; I do not know that they did not or that they did have any other attorney at law to transact their business in Minnesota.

Question. "At the *the* time you had the conversation with Wm. G. Ewing about the lot in controversy, as testified in your direct examination, were you the attorney or counsellor at law of Wm. G. Ewing?"

Answer. "I was not his attorney and counsellor at law until on or about the 28th day of June, 1850."

Question. "Had you not transacted law business for Wm. G. & G. W. Ewing in Minnesota prior to that time?"

Answer. "I am not aware that I did."

Question. "Have you the letter of instructions from Wm. G. Ewing given you in June, 1850, about which you testified on your direct examination?

Answer. "I have not the letter of instructions with me; I think it was given to Geo. W. Ewing on my settlement "with Chute & Co."

Question. "At what time were the instructions given you by Mr. Ewing, as you have testified in your direct examination?

Answer. "Verbal and written instructions as their attorney in fact, were given me somewhere from the first to the 20th of June, 1850. Instructions as attorney at law were given me on or about the 28th day of June, 1850.

The plaintiff here rested his case.

The defendants' counsel offered and read in evidence, the deposition of the defendant Byron D. Miner, taken under and by virtue of a commission issued out of this court on the third day of September, A. D. 1857, which commission was returned, executed, and filed in the clerk's office of this court, on the 25th day of Sept., 1857; which deposition is annexed to and made a part of this report; the plaintiffs' counsel objected to the introduction of the same, on the ground that it is the testimony by deposition of a party defendant in the action.

The defendant here rested this case, both parties declared their testimony all in.

Whereupon I, Geo. W. Prescott, sole referee to take the testimony in said action of Willoughby & Powers *vs.* Byron D. Miner, do report to the court that pursuant to the annexed order of court, and agreeable to a notice of hearing served in the cause, on the 16th and 17th days of February, A. D. 1858, the parties in this action appeared by H. R. Bigelow, Esq., for the plaintiffs, and by M. E. Ames, Esq., for defendant, and thereupon the testimony was introduced and the proceedings had as appears by the foregoing: that the witnesses were first severally sworn in the cause by me to testify the truth, the whole truth, and nothing but the truth; that

the testimony and proceedings were reduced to writing by me as by the foregoing appears, and I do report the foregoing as the testimony, and all the testimony produced before me by the parties severally in this action, and that at the conclusion of the same, the parties severally declared their testimony all in, and that they then rested the case upon all questions of fact. I further report that all the testimony of the witnesses on behalf of plaintiffs was objected to, as the same was given, by defendant's counsel, on the grounds of inadmissibility, irrelevancy, and immateriality, and was all and every part thereof taken subject to such objections.

Dated this 18th day of February, A. D. 1858.

GEO. W. PRESCOTT, Referee.

Territory of Minnesota, District Court,
2d District, County of Ramsey.

In the name of the United States, to L. C. Jacoby, Esquire, of Fort Wayne, in the State of Indiana, greeting:—

It having been represented to us that Byron D. Miner is a material witness for the defendant in a certain action now pending and at issue in our said court above named, wherein Amherst Willoughby and Simon Powers are plaintiffs, and Byron D. Miner is defendant, and that said witness resides out of this territory, now, therefore, you are hereby appointed sole commissioner to examine said witness; and you are hereby authorized to cause him to come before you at such time and place as you may therefore designate and appoint; when you will take his deposition under his oath or affirmation by you first in that behalf duly administered, upon all interrogatories and cross-interrogatories inclosed with or attached to these presents and none others; and the same, when thus taken, with this commission and and papers annexed, you will return to our said court, directed to the clerk thereof, at Saint Paul, in said county of Ramsey, with all convenient speed.

[2d Dist. Court Seal.] Witness the Honorable R. R. Nelson, Judge of said District Court at St. Paul aforesaid, this 3d day of September, A. D. 1857.

GEO. W. PRESCOTT, Clerk.

State of Indiana, Allen County.

I hereby certify that the within commission was executed by me at my office in the city of Fort Wayne, in the county of Allen, and State of Indiana, on the 11th and 12th days of September, A. D. 1857, between the hours of 8 o'clock A. M. and 6 o'clock P. M., of said days.

Fort Wayne, Sept. 12, 1857.

LYSANDER C. JACOBY, Commissioner.

Territory of Minnesota, District Court,
Second Judicial District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINER. } Stipulation.

It is hereby mutually stipulated and agreed by and between the undersigned attorneys of the respective parties in this action, that a commission may issue in the above entitled action forthwith, out of the district court aforesaid, to L. C. Jacoby, Esq., of Fort Wayne, in the State of Indiana, to take the deposition of Byron D. Miner, a witness on the part of the defendant in the above entitled action, upon the written interrogatories hereunto annexed; and that the said interrogatories hereunto appended and annexed may be annexed to and go out with the said commission, and be propounded to the said witness. Reserving, however, to the parties, and their attorneys respectively, the right to object to the admissibility of any of the said interrogatories and to the answer thereto, hereby waiving a compliance with the prerequisite forms and notices prescribed by the statute and the rules of court.

BRISBIN & BIGELOW,
Pl'ff's Att'ys.

Territory of Minnesota, District Court,
2d Judicial District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINER.

On reading and filing the stipulation of the attorneys of the respective parties in the above entitled action, it is ordered that a commission issue out of this court in *in* the said action, directed to L. C. Jacoby, Esq., to take the deposition of Byron D. Miner, a witness on behalf of the above named defendant, and that the written interrogatories hereunto appended and annexed be annexed to, and go out with the said commission in accordance with said stipulation.

Dated Saint Paul, Sept. 3, 1857.

R. R. NELSON,
Judge 2d District.

Territory of Minnesota,
District Court, Second Judicial District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINER.

Interrogatories to be propounded to Byron D. Miner, of Fort Wayne, in the State of Indiana, a witness on the part of the defendant in the above entitled action.

First interrogatory. Are you the defendant in the above entitled action? where is your place of residence, and how long have you resided where you now do?

Second interrogatory. State whether or not you was at any time acquainted with one William G. Ewing, of Fort Wayne, in the State of Indiana, and if you answer yea, state when and for how long a time you were acquainted with him, and whether the said William G. Ewing is now living or deceased; and if you answer that he is deceased, then state if you know when and where he died.

Third interrogatory. State whether you at any time purchased from the said William G. Ewing, any lot, piece, or parcel of land in the town or city of Saint *of St.* Paul, in the territory of Minnesota; and if you answer yea, then state the time when and where you made such purchases.

Describe the premises so purchased by you as near as you can, and state what sum or consideration you paid for the same, if any, and to whom it was paid by you, and whether you received any deed of conveyance of such real estate, and if you did, by whom was the same executed and delivered, and to whom?

Fourth interrogatory. If you answer the last preceding interrogatories in the affirmative, then state whether, before or at the time of such purchase by you, you knew of the existence of any bargain, contract, or agreement, between the said William G. Ewing and the plaintiffs for or concerning the sale of the said premises to the plaintiffs, or if you have any knowledge or information that any bargain, contract, or agreement, had been made or entered into by the said William G. Ewing, to sell or convey the said premises to the plaintiffs.

Fifth interrogatory. If you answer the last preceeding interrogatory in the negative, then state when, at what time you first learned or knew of the existence of any contract or agreement or pretended contract or agreement for the sale of the said premises by the said Ewing to the plaintiffs, and how you was informed of the same.

Sixth interrogatory. If you did purchase said premises, state whether at the time you purchased the same, you knew of, or had any notice or information of any previous bargain, contract, or agreement made by said Ewing, or any one else, for the sale or conveyance of the lot, piece or parcel of land described in the complaint to the plaintiffs, or any other person or persons.

Seventh interrogatory. State if, at the time you purchased and received a deed of the said premises, you knew or had any notice or information that the plaintiffs were in the possession or occupancy of the same, or that they had made or were making any improvements upon the premises, or that they claimed the right to possess and occupy the same.

Eighth interrogatory. Do you know of any other matter or thing advantageous to the defendant in this action? If yea, state the

same as fully and particularly, as if thereunto particularly interrogated.

Saint Paul, Aug. 25, 1857.

AMES, VAN ETTEN & OFFICER,
Defendants' Attorneys.

Territory of Minnesota,
Ramsey County, District Court, Second Judicial District.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINER.

Cross-interrogatories to be administered to Byron D. Miner, a witness, sworn and examined on the behalf of the above named defendant:—

First. When, how, and by whom, and where were you first informed of the pendency of this suit?

Second. When, where, and with whom was the treaty for the sale and purchase of the property described by you in your direct examination made; what induced you to make the purchase, and upon what representations? If any, state particularly what was said and done on the occasion of the purchase.

Third. Was not the negotiation for the sale and purchase made in part with G. W. Ewing?

Fourth. Did not the Messrs. Ewing, or either of them, inform you at or before the pretended sale and purchase that the lands in controversy were adversely claimed?

Fifth. Did not either of the Messrs. Ewing inform you that the plaintiffs or other parties claimed the lands by virtue of an alleged contract made with David Olmsted or any other party?

Sixth. If you state that you have at any time been informed that the plaintiffs claimed the lands in dispute, state when, where, and of whom you derived such information, and all the facts and particulars relating thereto.

Seventh. If you state that any consideration was paid by you for the land in controversy, state the amount, when paid, and in what kind, whether money, note, or property, and whether such consideration had actually been paid ever by you, and if so, when and to whom.

Eighth. Did Richard Chute inform you that the lands in controversy were claimed or owned by the plaintiffs?

Ninth. Do you know any other matter or thing advantageous to the plaintiffs? If so, state the same particularly.

St. Paul, Sept. 2d, 1857. BRISBIN & BIGELOW,
Pl'ffs' Att'ys.

State of Indiana, Allen County, *ss.*

Deposition of Byron D. Miner, taken before S. C. Jacoby, in pursuance of the foregoing and annexed commission.

Byron D. Miner, being first duly sworn, deposes and says as follows:—

First. In answer to the first interrogatory on the part of the defendant, I answer that I am the defendant in the above entitled cause, wherein Amherst Willoughby and Simon Powers are plaintiffs, and I am the defendant. I reside at Fort Wayne, Allen County, in the State of Indiana, where I have resided since some time in the year 1848.

Second. In answer to the second interrogatory propounded by the defendant, I answer I was acquainted with William G. Ewing in his lifetime; he resided at the city of Fort Wayne, Allen County, in the State of Indiana; I became acquainted with him some time in the year 1838, which acquaintance continued until his decease, in July, 1854; he is not now living; he died July 11th, 1854, at La Point (an island in Lake Superior, in Wisconsin).

Third. In answer to the third interrogatory propounded on the part of the defendant, I answer that in the month of September, 1850, I purchased of William G. Ewing part of two lots numbered six and seven, in block number twenty-six of the original plot of the town of St. Paul, in Ramsey County, in Minnesota Territory; I made said purchase on the 27th day of September, 1850; I made the said purchase at Fort Wayne, Indiana, of the said William G. Ewing; the property as near as I am able to describe it, is as follows, viz: Fifty feet fronting on Robert Street, thence running back on the line and parallel with Fourth Street, one hundred feet, being a corner lot, fifty feet on Robert Street and one hundred feet on Fourth Street. I paid for said property four hundred and fifty dollars, for which sum I executed to W. G. and G. W. Ewing my two notes, one for two hundred dollars, payable at two years, and one for two hundred and fifty dollars, payable three years from date; the notes were dated and executed on the 27th Sept., 1850, and were with interest at the same time the said William G. Ewing delivered to me a warrantee deed for said property executed by himself and Ester Ewing, his wife.

Fourth. In answer to the fourth interrogatory propounded the part of the defendant, I answer that before I made said purchase, and at the time I made said purchase, I had no knowledge of the existence of any bargain, contract, or agreement between the said William G. Ewing and the plaintiffs for or concerning the sale of said premises to the plaintiffs, nor had I any information thereof, nor have I any knowledge or information that any bargain, contract, or agreement, have been made or entered into by the said William G. Ewing to sell or convey the said premises to the plaintiffs, nor had any belief or reason to believe, that any such bargain, contract, or agreement existed, or had ever been made or entered into.

Fifth. In answer to the fifth interrogatory propounded on the part of the defendant I answer, that in the spring of 1854 I was

detained at Jamesborough, Indiana, by high water, and I then first learned from Richard Chute that the plaintiffs, Willoughby & Powers, claimed that there was an existing bargain, contract, or agreement, for the sale of said premises to them by said William G. Ewing.

Sixth. In answer to the sixth interrogatory propounded on the part of the defendant I answer, that at the time I purchased said premises I did not know, nor had I any notice or information of any previous bargain, contract, or agreement, made by the said William G. Ewing, or any one else, for the sale or conveyance of the lot, piece, or parcel of land described in the complaint to the plaintiffs, or any other person or persons.

Seventh. In answer to the seventh interrogatory propounded on the part of the defendant I answer, that at the time I purchased and received a deed for the said premises, I did not know, nor had I any notice or information that the plaintiffs were in the possession or occupancy of the same, nor that they have made or were making any improvements upon the premises, nor that they claimed the right to possess or occupy the same.

Eighth. In answer to the eighth interrogatory propounded on the part of the defendant I answer, that there is not within my present recollection any other matter or thing which is to my knowledge advantageous to the defendant, which I can testify to.

BYRON D. MINER.

And the said Miner in answer to the cross-interrogatories, deposes and says as follows:—

First. In answer to the first cross-interrogatory I answer, that I was informed of the pendency of this suit in the spring of 1855, while I was at Fort Wayne, Indiana. My information was from Richard Chute, by letter from him to me. It might have been as late as the first of June, 1855.

Second. In answer to the second cross-interrogatory I answer, that the treaty for the sale and purchase of the property described by me in my direct examination was made in September, 1850, at Fort Wayne, Indiana, with the said William G. Ewing and myself. I was induced to make the purchase by the statements and representations of the said William G. Ewing, in whom I had entire confidence. I knew from other information that St. Paul was a good place to make investment. I was making purchases elsewhere also, and have done so since. The hope of making money by the advance of the property was the inducement to the purchase. This hope was based in part upon what I had heard of the prospects of St. Paul, and in part upon the representations of said William G. Ewing. I cannot recollect all the conversation, not the language, used upon the occasion of said purchases. But as near as I can state, I will say that said Ewing wanted to sell me the property aforesaid—said it would be increasing in value, and would be a

good investment. The terms were such as were satisfactory to us both, and therefore I agreed to purchase. He executed and delivered to me his warranted deed for the property, and I executed and delivered to him my notes—one for two hundred dollars at two years with interest, and one note for two hundred and fifty dollars at three years interest—both notes were made payable to Wm. G. & G. W. Ewing.

Third. In answer to the third cross-interrogatory I answer, that I did not see G. W. Ewing in 1850. I never had any conversation with said G. W. Ewing in relation to said property until in the year 1854, and after the decease of said William G. Ewing. The negotiation for the sale and purchase aforesaid was not made in part with G. W. Ewing.

Fourth. In answer to the fourth cross-interrogatory I answer, that the Messrs. Ewing did not, nor did either of them at or before the sale and purchase aforesaid, inform me that the land in controversy were adversely claimed.

Fifth. In answer to the fifth cross-interrogatory I answer, that neither of the Messrs. Ewings before or at the time of said sale and purchase informed me that the plaintiffs or other parties claimed the lands by virtue of an alleged contract made with David Olmsted or any other party. Nor have I ever been so informed by either of the said Ewings, according to the best of my knowledge, recollection, information, and belief.

Sixth. In answer to the sixth cross-interrogatory I answer, that in the spring of 1854, at Jonesborough, Indiana, I was informed by Richard Chute that the plaintiffs claimed the same in dispute. This was the first time I received any such information; afterwards, in the month of May or June, 1855, I received a letter from said Chute while I was at Fort Wayne, informing me of the pendency of commencement of this suit; and soon afterwards I was, while at Fort Wayne, informed of the same by a letter from Ames & Van Etten. The facts and particulars relating to my information, as fully as I am able to state them, are, that while detained by high water at Jonesborough, Mr. Chute stated to me in substance that David Olmsted had sold said property to the plaintiffs, and that W. G. Ewing had refused to ratify the sale. That he, Chute, had taken from one Babcock some $300, and that W. G. Ewing refused to have anything to do with it, and that he and W. G. Ewing had had some words about the money, and W. G. Ewing would not have it. The letter informed me simply of the commencement or pendency of this suit. This is as fully as I can state the particulars referred to in the sixth cross-interrogatory.

Seventh. In answer to the seventh cross-interrogatory I answer, that the consideration for the land in controversy was the sum stated in my two notes as specified in answer to the second cross-interrogatory, and the amount was specified in said notes. There was no time after the first of said notes became due, and up to the present time, when the firm of W. G. & G. W. Ewing has not been indebted

to me in a sum larger than the sums due on said notes. These notes were paid in the following manner, viz: on the 20th Sept., 1854, the interest was computed and the amount of principal and interest was, by George W. Ewing, surviving partner of W. G. & G. W. Ewing, entered on the books of said W. G. & G. W. Ewing against me in my account on said books. There was about six hundred dollars due to me from that firm after charging me the amount of these notes, viz., $558. There was still a balance due to me. This is the way said consideration has been paid, and it has been actually paid in the manner stated.

Eighth. In answer to the eighth cross-interrogatory I answer, that Richard Chute did, at the time and place (and never before) mention in answer to the sixth cross-interrogatory, inform me that the lands in controversy were claimed by the plaintiffs. He never informed me that the land was owned by the plaintiffs.

Ninth. In answer to the ninth cross-interrogatory I answer, that I do not within my present recollection know any other matter or thing advantageous to the plaintiffs. B. D. MINER.

State of Indiana, Allen County.

I, Lysander C. Jacoby, hereby certify that the foregoing deposition was taken at my office in the city of Fort Wayne, in the county of Allen, and State of Indiana, on the eleventh and twelfth days of September, A. D. 1857, and between the hours of 8 A. M. and 6 P. M. of said days. That the said Byron D. Miner was first by me solemnly sworn that the testimony he should now give before me in this deposition relating to the cause pending in the District Court of the County of Ramsey, 2d District, in the Territory of Minnesota, wherein Amherst Willoughby and Simon Powers are plaintiffs, and Byron D. Miner is defendant, should be the truth, the whole truth, and nothing but the truth, that the foregoing deposition was written down by me in the presence of the deponent, that each and every of the interrogatories and cross-interrogatories annexed to and accompanying the foregoing commission were by me duly propounded to the said deponent, and the answer thereto written down as aforesaid; that afterwards the same were carefully read over by the said deponent, and were then duly subscribed by him in my presence as well the answers to the questions propounded in chief as the questions propounded on the cross-examination.

In testimony whereof I have hereunto set my hand this twelfth day of September, A. D. 1857.

LYSANDER C. JACOBY, Commissioner.

Expenses of executing this commission, $10.

L. C. JACOBY.

(On Envelope.) GEORGE W. PRESCOTT,
Clerk of the District Court of the County of Ramsey,
2d District, St. Paul, Territory of Minnesota.

Opened by me and filed Sept. 25, 1857.

G. W. PRESCOTT, Clerk.

Deposition introduced and read by defendant's counsel on hearing before referee, and referred to in annexed report.

Attest, GEO. W. PRESCOTT, Referee.
Filed March 1, 1858. GEO. W. PRESCOTT, Clerk.

Territory of Minnesota, District Court, Second Judicial District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS ag'st BYRON D. MINER. } Notice of trial.

You will please take notice that the above entitled action will be brought to trial at a general term of this court, appointed to be held in and for the County of Ramsey, at the court-house in the city of St. Paul, on the first Monday of September, A. D. 1857, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated St. Paul, August 25th, A. D. 1857.

Yours, &c., BRISBIN & BIGELOW,
Attorneys for Pl'ffs.

To AMES & VAN ETTEN, Attorneys for defendant.

Due service of within notice of trial is hereby admitted this 18th day of August, A. D. 1857.

AMES, VAN ETTEN & OFFICER,
Attorneys for def't.

Territory of Minnesota, District Court, Second Judicial District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS ag'st BYRON D. MINER. } Notice of trial.

You will please take notice, that upon the pleadings and proof therein, the above entitled action will be brought to hearing and trial at a special term of this court, to be held at the capitol, in the city of St. Paul, on the first day of March, A. D. 1858, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated St. Paul, Feb. 19, 1858.

Yours, &c., BRISBIN & BIGELOW,
Attorneys for Plaintiffs.

To AMES, VAN ETTEN & OFFICER, Att'ys for def't.

Due service of within notice of trial is hereby admitted this 19th day of February, A. D. 1858.

AMES, VAN ETTEN & OFFICER,
Attorneys for def't.

Filed March 1, 1858. GEO. W. PRESCOTT, Clerk.

Special term, St. Paul, March 1st, 1858. The parties within appearing by their counsel respectively, the pl'ffs by Mr. Bigelow and the defendant by Mr. Ames, on the application of Mr. Ames, of counsel for def't, Mr. Bigelow of counsel for pl'ffs, the hearing of the within cause is hereby postponed to Saturday, the 6th day of March instant, at 10 o'clock A. M. of this day, at this present term of this court.

R. R. NELSON,
Judge Second District.

District Court, 2d Judicial District, County of Ramsey, *ss.*

Mar. 6, March Special Term, A. D. 1858, 4th day.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINER.

Hearing upon the pleadings and the proofs reported by the referee. Argued by H. R. Bigelow, Esq., for plaintiff. Written argument submitted by M. E. Ames, Esq., for defendant. Cause submitted and held under advisement.

Mar. 9, March Special Term, A. D., 1858, 5th day.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINER.

And now the several issues and proofs thereon in this cause having been duly considered, and the court being duly advised thereon, it is ordered, declared, and decreed, that the deed of conveyance mentioned and described in the pleadings in this action, which was executed and delivered by William G. Ewing to the defendant Byron D. Miner, bearing date the 27th day of September, A. D. 1850, and recorded in the office of the Register of Deeds of the county of Ramsey, on or about the 18th day of October, A. D. 1850, in book "B" of Deeds, in pages 19 and 20, was executed and delivered in fraud of the rights of the plaintiffs in and to the lands therein described, and was and is void as against said plaintiffs; that the said plaintiffs are entitled to the lands, tenements, and hereditaments in said deed of conveyance and in the complaint in this action mentioned and described, that is to say, to all that certain lot or piece of land situate, lying, and being in the town of St. Paul, in the territory of Minnesota, being a piece of land on the northwest corner of block number twenty-six (26), fronting on Robert Street fifty (50) feet, and running back on Fourth Street one hundred (100) feet, more or less; and that the title to the said real estate and premises shall and do, by the judgment or decree to be entered in this action, pass to and become fully vested in the said plaintiffs Amherst Willoughby and Simon Powers, their heirs and assigns, forever, to the exclusion of the said defendant Byron D. Miner, and

all and any persons claiming under him, from all right, title, and interest to or in the same or any part thereof, and that without any further act to be done by or on the part of the defendants, or either of them, or of any other person or persons whatever; and it is further ordered that judgment be entered in this action by the clerk of this court in favor of said plaintiffs and against said defendant, in accordance with the provisions of this order, and for costs.

By the court.

Attest, GEO. W. PRESCOTT, Clerk.

I hereby certify the within to be a full and true copy of the order of court in the cause therein entitled, and of the proceedings in said cause, as the same appear in the minutes of court for the days and at the term within mention.

Attest, GEO. W. PRESCOTT, Clerk.

Territory of Minnesota, District Court,
2d Judicial District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
against
BYRON D. MINER.

Gentlemen: You will please take notice that on Saturday, the 13th day of March, A. D. 1858, at ten o'clock A. M. of that day, the costs of the plaintiffs in the above entitled action will be taxed and adjusted by and before Geo. W. Prescott, Esq'r, the clerk of this court, at his office in the capitol in the city of Saint Paul, and inserted in the judgment which will then and there be entered in said action in favor of said plaintiff, pursuant to the order of said court this day entered in said action, and that the following are the items of costs and disbursements which will be claimed in behalf of said plaintiffs upon such tax above.

For all proceedings before notice of trial,	12 00
" subsequent " "	7 00
" trial,	15 00
	34 00
Am't br't up,	34 00
Costs awarded on denial of mo. for leave to answer (Nov. 8, '55),	10 00
" " granting leave (Nov'r 23, '55,	10 00
Callender fee June term, 1856,	10 00
" " Sept. " 1857,	10 00
" " Oct. " "	10 00
Fees of referee as fixed by stipulation of parties,	30 00

Witness' fees: David Olmsted, 2 days $2, mileage 24 c,	2 24
Richard Chute, 1 day $1, mileage $1 20,	2 20
L. A. Babcock, 2 days $2, mileage 12,	2 12
Five affidavits @ 2s,	1 25
Out $2 00. Printer's fees, publishing summons,	5 50
Clerk's fees, including certified copy jud'gt,	10 00
Register's fees, recording certified copy judg't,	1 50
	$128 81

Yours, &c.,

BRISBIN & BIGELOW,
Pl'ffs' Att'ys.

Dated St. Paul, M. T., March 10th, 1858.
To Messrs. AMES, VAN ETTEN, & OFFICER,
Def'ts' Attorneys.

Ramsey County, *ss.*

Horace R. Bigelow, of St. Paul in said county, sworn, deposes and says, that he is one of the attorneys for the plaintiffs in the above entitled action, and that he verily believes the items of disbursements embraced in the foregoing bill of costs, and each and every of such items to be correct and properly and legally chargeable in said bill. H. R. BIGELOW.

Subscribed and sworn to before me, this 13th March, 1858.
GEO. W. PRESCOTT, Clerk.

Costs taxed this 13th day of March, A. D. 1858, against the defendant according to foregoing bill, at $138 81, no one appearing to oppose. GEO. W. PRESCOTT, Clerk.

Due service of within by receipt of a copy thereof, is hereby admitted this 10th March, A. D. 1858.
AMES, VAN ETTEN & OFFICER,
Def'ts' Att'ys.

Territory of Minnesota,
District Court, 2d Judicial District, County of Ramsey.

AMHERST WILLOUGHBY and SIMON POWERS
ag'st
BYRON D. MINER.

Pursuant to the order of this court, duly entered in their action on the ninth day of March, A. D. 1858, and on motion of Messrs. Brisbin and Bigelow, plaintiffs' attorneys—

It is hereby declared, adjudged, and decreed, that the deed of conveyance mentioned and described in the pleadings in this action, which was executed and delivered by William G. Ewing to the defendant Byron D. Miner, bearing date the 27th day of September,

A. D. 1850, and which was recorded in the office of the Register of Deeds of the county of Ramsey, on or about the 18th day of October, 1858, in book "B" of deeds, on pages 19 and 20, was executed and delivered by the said William G. Ewing, and received by the said defendants in fraud of the rights of the plaintiffs, Amherst Willoughby and Simon Powers, in and to the lands therein described, and was and is void as against the said plaintiffs; that the said plaintiffs are entitled to the lands, tenements, and hereditaments in said deed of conveyance, and in the complaint in this action mentioned and described, that is to say, to all that certain lot or piece of land situate and lying in the town of St. Paul, in the territory of Minnesota, being a piece of land on the northwest corner of block number twenty-six (26), fronting on Robert Street fifty feet, and running back on Fourth Street one hundred feet, more or less, and that the title to said real estate and premises shall, and do hereby pass to and become fully vested in said plaintiffs, Amherst Willoughby and Simon Powers, the heirs and assigns forever, to the exclusion of the said defendant, Byron D. Miner, and of any and all persons claiming under him of and from all right, title and interest in or to the said premises, and without any act to be done on the part of the said defendant, or any other person or persons, and the title to the said lands is hereby adjudged to pass to the said plaintiffs, and is hereby declared to be, and is, fully vested in the said plaintiffs, their heirs and assigns forever.

And it is further adjudged and decreed that the said plaintiffs do receive of the said defendant the sum of one hundred and thirty-eight dollars and eighty-one cents for their costs and disbursements in this action, and that they have execution therefor.

By the Court.

Dated March 13, 1858.

Attest, GEO. W. PRESCOTT, Clerk.

Filed March 13, 1858. GEO. W. PRESCOTT, Clerk.

State of Minnesota, County of Ramsey, District Court of the County of Ramsey, Second Judicial District.

AMHERST WILLOUGHBY and SIMON POWERS, Respondents,
against
BYRON D. MINER, Appellant.

To R. F. Houseworth, Clerk of the District Court of the County of Ramsey, in the Second Judicial District of the State of Minnesota, and to Messrs. Brisbin & Bigelow, Attorneys for plaintiffs, respondents above named.

Gentlemen: You will please to take notice that the above named defendant, Byron D. Minor, appeals from the judgment and decree recorded and entered in the above entitled action against him, in favor of the plaintiffs therein, on the 13th day of March, A. D. 1858,

1643

in the District Court aforesaid, and from every part thereof, to the Supreme Court of the State of Minnesota.

Dated at Saint Paul, September 4th, 1858.

Yours respectfully, M. E. AMES,
Attorney for Defendant and Appellant.

(The foregoing endorsed as follows:)

Filed Sept. 6, 1858. R. F. HOUSEWORTH, Clerk.

State of Minnesota, County of Ramsey, *ss.* District Court, County of Ramsey, Second Judicial District.

AMHERST WILLOUGHBY and SIMON POWERS, Respondents,
against
BYRON D. MINER, Appellant.

Whereas, the above named Byron D. Miner has appealed to the Supreme Court of the State of Minnesota from a judgment and decree recovered and entered in favor of Amherst Willoughby and Simon Powers, the above named plaintiffs, against him, Byron D. Miner, in the above entitled action, in the District Court of the County of Ramsey, in the Second Judicial District of the late Territory of Minnesota, now in the State of Minnesota, on the thirteenth (13th) day of March, in the year one thousand eight hundred and fifty-eight (1858.)

Now, therefore, we, M. Sweetser and Michael E. Ames, of the city of Saint Paul, County of Ramsey, and State of Minnesota, do hereby undertake on the part of the said appellant, that the said Byron D. Miner, appellant, will pay all damages, costs and charges which may be awarded (or recovered) against him on the said appeal (or in the action aforesaid), not exceeding the sum of two hundred and fifty dollars ($250 00).

Dated at Saint Paul, the 4th day of September, A. D. 1858.

M. SWEETSER,
MICHAEL E. AMES.

State of Minnesota, County of Ramsey, *ss.*

M. Sweetser and Michael E. Ames, of said county and State (and above named), came personally before me, and being by me duly sworn, each for himself, deposes and says, that he is a resident of said county and State, and is worth the sum of five hundred dollars over and above all debts and liabilities which he owes or has incurred in property not exempt from levy and sale on execution.

M. SWEETSER,
M. E. AMES.

Subscribed and sworn to severally before me the 4th day of September, A. D. 1858, as to M. Sweetser.

R. R. NELSON, U. S. Dist. Judge.

Subscribed and sworn to severally before me the 4th day of September, A. D. 1858, as to M. E. Ames.

HENRY M. SLADE, Notary Public.

(The foregoing endorsed as follows):—

"The within undertaking is hereby approved, Sept. 6th, 1858.

E. C. PALMER, Dist. Judge."

"Filed Sept. 6, 1858. R. F. HOUSEWORTH, Clerk."

State of Minnesota, County of Ramsey, *ss.*

To the Hon. the Chief Justice of the Supreme Court of the State of Minnesota:—

I, R. F. Houseworth, Clerk of the District Court for the 2d Judicial District and County of Ramsey aforesaid, hereby certify and return that the foregoing and annexed are true copies of the "Judgment Roll," "Notice of Appeal, and "Undertaking on Appeal," filed in the foregoing entitled action, as appears from the originals remaining of record in my office.

[Seal of District Court, Ramsey County, Second District, Minnesota.]

Witness my hand and official seal at the city of St. Paul in said county this thirteenth day of November, A. D. 1858.

R. F. HOUSEWORTH, Clerk.

By SHERWOOD HOUGH, Dep't. Cl'k.

Above endorsed as follows: No. 26. District Court Ramsey County, No. 26. Willoughby & Powers, resp'd'ts, *against* Byron D. Miner, Appeal. Return to Appeal. Filed Nov. 24, 1858.

W. F. WHEELER, Dep'ty Clerk.

246 folios, $24 60. M. E. AMES, Attorney for Appellant.

State of Minnesota, Supreme Court.

December Term, 1858.

AMHERST WILLOUGHBY and SIMON POWERS, Respondents,
against
BYRON D. MINER, Appellant.

Points and authorities relied upon by the appellant—

The complaint states, that on the 13th day of March, A. D. 1850, William G. Ewing (since deceased) was seised and possessed of a certain lot on the northwest corner of block 26, fronting on Robert Street 50 feet, and running back on 4th Street 100 feet in depth, in the city of St. Paul, that William G. Ewing so continued to be seised and possessed of the premises until the 27th day of September, 1850.

That on the 13th day of March, 1850, one David Olmsted and

Wm. G. Ewing, by David Olmsted his attorney in fact, executed and delivered to the plaintiffs the instrument in writing set forth in the complaint.

This instrument was made and signed by Olmsted *only*.

That afterwards this instrument in writing was filed for record and recorded in Ramsey County on the 25th of June, 1850.

That immediately after the making and delivery of this instrument in writing (June 25, 1850), the pl't'ffs went into possession of the lot.

That in the month of April, 1850, plaintiffs commenced building upon the lot, that the buildings thereon have been continually used and occupied for business purposes by the pl't'ffs ever since their erection, and that the plaintiffs have expended in such improvements the sum of $3,000 00 or thereabouts.

That at the time of the alleged purchase the sum of $300 00 was a fair and adequate price for the premises.

That by reason of the improvements made by the plaintiffs, and also of the advancement and use of real estate in the city of Saint Paul, the premises are now worth $10,000, or thereabout.

The plaintiffs allege the payment of the purchase money ($330) to Wm. G. Ewing, according to the terms of the written instrument made by Olmstead.

That Ewing suffered and permitted the plaintiffs to occupy and enjoy possession of the premises, and subsequently assented to and ratified the act of his agent, Olmsted.

That Ewing failed and refused to comply with the agreement made by Olmsted with the plaintiffs, and refused to deed the lot to plaintiffs.

That afterwards, on the 27th day of September, 1850, Ewing sold and conveyed the lot in question by warranty deed, of that date to the defendant.

That the defendant knew of the agreement made by Olmsted with the plaintiffs, and of the plaintiffs' possession of the premises at the time he purchased and received a deed from Ewing.

The plaintiffs ask the relief,

1st. That the deed from Ewing to the defendant, of September 27th, 1850, may be declared cancelled.

2d. Or that the premises therein mentioned may be adjudged to the plaintiffs, or for such other or further relief as to the court may seem meet and proper in the premises.

The answer of the def't. (See folios from 59 to 75 inclusive.)

1st. Admits that the said Wm. G. Ewing (now deceased), late of Fort Wayne, State of Indiana, was in his lifetime, and at the time in the complaint stated, seised in fee simple, and the owner of the lot described in the complaint.

2d. That afterwards, on the 27th day of September, 1850, he sold and conveyed the premises to the defendant by warranty deed in the proper and usual form.

That on the 18th day of October, 1850, the deed of conveyance from Ewing to the def't was duly recorded in the Register's office in Ramsey County, where the premises are situated.

That the def't paid to Ewing for the lot $450 purchase money, which was at that time a full, fair and adequate consideration for the same.

3d. That at the time the defendant so purchased the premises and received a deed from Ewing therefor, the def't had no notice, knowledge, or information whatever that the plaintiffs or either of them had or claimed to have any title to, or interest in or to the premises, or any part thereof, equitable or otherwise.

And without any notice whatever, that the plaintiffs had bargained or contracted in any manner for the premises, as stated in the complaint or otherwise.

4th. That the defendant is informed and believes, and therefore admits to be true, that the plaintiffs have been in possession of the said premises, and that they have erected a building and improvements thereon, and use and occupy the same for business purposes.

But the defendant has not any knowledge or information thereof sufficient to form a belief as to when, or at what time the pl'ffs went into possession or occupancy of the premises, or when they commenced making or made improvements thereon, or what amount they have expended in erecting buildings or other improvements upon the premises.

5th. The answer denies that the premises are worth the sum of $10,000, as stated in the complaint.

But states, upon information and belief, that the same are worth about $6,000, and no more or greater sum.

6th. *Denies* that the plaintiffs, or either of them, have ever paid or caused to be paid to Wm. G. Ewing the sum stated in the complaint as consideration or purchase money for the lot, or any other sum whatever, and denies that the said Wm. G. Ewing had ever had or received any sum of money or other consideration from the plaintiffs for the said premises, or as consideration or purchase money therefor.

7th. *Denies* that the said Ewing has ever at any time assented to, or ratified any act, deed, or agreement, for the sale of said premises to the plaintiffs in any manner, as stated in the complaint or otherwise.

8th. *Expressly denies* that on the 13th day of March, 1850, or at any other time, the said David Olmsted in the complaint mentioned was the attorney in fact of the said Ewing, or that the said Olmsted had any power, authority, or right whatever from the said Ewing to bargain or sell the said premises, or to make or enter into any contract, instrument, or agreement with the plaintiffs, or any one else, for the sale and conveyance of the said premises, as stated in the complaint or otherwise.

9th. *Denies* that the said Wm. G. Ewing ever made or delivered

the instrument in writing in the complaint recited and set forth to the plaintiffs, or either of them, or that he ever at any time consented to the same.

10th. Defendant admits that he is seised and the owner of the said premises, and holds the legal title thereof.

And asks to be hence dismissed, &c.

The reply of the plaintiffs simply puts in issue the new matter set up and contained in the answer (see folios 76 to 78 inclusive) upon the issues then made by the pleadings in the cause.

The same was afterwards referred by the court to Geo. W. Prescott, Esq. (sole referee), to examine witnesses, take and report the testimony in the cause to the court.

And the evidence was duly taken and reported by the said referee.

See testimony of *David Olmsted*, a witness on the part of the plaintiffs. From folio 85 to folio 105 of the record.

Also the letter from Richard Chute to David Olmsted, dated Aug. 9, 1849. Exhibit "A."

Also copy of the bond *from Olmsted* to the plaintiffs to sell and convey the lot set forth in the complaint of March 13th, 1851, marked "Exhibit B."

See *testimony* of Richard Chute on the part of the plaintiffs, from folios 110 to 137 of the record.

Testimony of *Amherst Willoughby* (one of the plaintiffs), from folio 137 to 146 of the record.

Testimony of *L. A. Babcock* on behalf of the plaintiffs, from folio 146 to 174 of the record.

Testimony offered and given on the part of the defendant.

See the deposition of Byron D. Miner, def't, taken abroad, under commission deposition, from folio 197 to 216 *inclusive.*

Order and final *decree* of the District Court, from folio 225 to folio 229 *inclusive.*

First. Richard Chute was not the attorney in fact authorized or empowered as such to bargain, contract, sell, or convey the lot in question, or any other real estate, for or in the name of William G. Ewing (the owner), or for the firm of W. G. & G. W. Ewing, and did not have or possess any legal right, power, or authority, to bargain or sell the same.

Second. That Richard Chute had no right, power, or authority whatever to substitute, constitute, or appoint David Olmsted an agent to sell the lot in question, or any other real estate of Wm. G. Ewing, or of W. G. & G. W. Ewing; and the letter from Chute to Olmsted, dated Aug. 9, 1849, marked "Exhibit A," did not convey any legal power or authority to Olmsted to contract, bargain, or sell the lot in question, or any other real estate.

See Story on Agency, page 48, sec. 49 and notes.

Same " " 183 " 146

do " " " 13

9 Wendell Rep., pp. 75, 76, and 77, Blood *vs.* Goodrich et al.
5 Hill " 113 Lawrence *vs.* Taylor.
20 Wendell " 258 Wells *vs.* Evans.
Dunlap's Galey's Agency, p. 156 to 158 and notes.
13 Johnson's Rep., 307, White *vs.* Skinner.
4 Pickering Rep., p. 160, Talmore *vs.* Emmerson.
4 Munroe " 41 and 392.

Third. If Chute had been duly appointed and constituted the agent and attorney in fact of Ewing, to sell and convey the premises in question, and possesssed the authority and right to do so, still he had no power or authority whatever to substitute and appoint Olmsted, or any other person, to do and perform the same act without having express authority of substitution under seal. The authority to an agent being a trust delegated to and reposed in him personally cannot by him be delegated to another to perform.

See 2 Kent's Com. (4 ed.), p. 633.
1 Livermore on Agency, 52 to 66, sec. 5.
1 Hill Rep., p. 505, Commercial Bank *vs.* Morton.
12 Mass. p. 237, Emmerson *vs.* Hat Company.
4 Mass. p. 596, Tippet *vs.* Walker et al.
Story on Agency 16 sec. 14.
26 Wendell, 493 and 494, Lyon *vs.* Jerome.

Fourth. The bond (or instrument) from Olmstead to the plaintiffs, dated 13th March, 1850, is undoubtedly the bond of Olmsted, and may be valid and binding against him to the extent of the penalty fixed in the bond, but is not the bond, act, or deed of Ewing, and he was not bound by it, and his grantor cannot be effected by it.

See 4 Mass. Rep., p. 596, Tippets *vs.* Walker.
5 Mass. Rep., pp. 24 and 40, Banorger *vs.* Hovey.
20 Wendell Rep., p. 258, Wells *vs.* Evans.

Fifth. The bond (or instrument) made and delivered by Olmsted to the plaintiffs on the 13th of March, 1850, marked "Exhibit B," was not entitled to record, and such an instrument could not be legally or properly recorded under the statute then in force in Minnesota, because the same was not acknowledged or proved, and did not have two subscribing witnesses, therefore the recording of the same was not notice actual or constructive of its existence or contents for any purpose.

See Statutes of Wisconsin of 1839, page 179, sec. 10, then in force in Minnesota.

Rev. stat. of Min., p. 211, ch. 46, sec. 7.

Sixth. That the said bond (or instrument) of the 13th of March, 1850, was void.

See provision of statutes above cited.

Laws of Minnesota 1849, p. 134, sec. 10.

Section 12 of the Organic Act of Minnesota containing the laws of Wisconsin in force in Min.

Seventh. That the pretended contract bond or instrument in writing made by Olmsted on the 13th of March, 1850, to sell and convey the said lot to the plaintiffs, was made without authority, and was not ever at any time thereafter assented to, ratified, or adopted by the owner thereof, Wm. G. Ewing, or any one else in his behalf; but on the contrary, he objected to and refused his assent thereto, or to sanction the action and acts of Olmsted relating to the same as soon as he was advised or apprised that such contract had been made by Olmsted.

To this point, see the evidence.

Eighth. That if, as is contended by respondents, the lot in question was in equity the property and estate of the late firm of Wm. G. Ewing & G. W. Ewing, neither W. G. Ewing or G. W. Ewing *alone* as one copartner of the firm could himself make or execute any valid conveyance by deed or otherwise of the property of the firm, and therefore one copartner could not alone execute a power of attorney, or confer power and authority upon an agent or attorney in fact to either negotiate, bargain, or sell the same.

See 9 Wendell Rep., pp. 75, 76, 77, Blood *vs.* Goodrich et al.
1 Wendell Rep., 431, Van Ostrand *vs.* Reed.
5 Mass. Rep., 40, Banorger *vs.* Harvey et al.
5 Binney Rep., 613.
7 Taunten, 207.
1 Teats, 200.
3 Com. Law., 54.
1 Comyn's Dig., chap. 5 of Att'y in fact.
1 Wendell, 326, McBride *vs.* Hogan.
2 Carrie's Rep., 254, Green *vs.* Beales.
3 Johnson Cases, 180, Clement *vs.* Bush.
2 Johnson Rep., 213, Town *vs.* Goodrich et al.

Ninth. Because the court below did not find or state the facts found, and the conclusions of the law separately or otherwise, or any finding or decision upon the facts of the case, or find or state any conclusion of fact or law whatever, and the finding and decision is insufficient and contrary to the statute.

See Statute of Minor, p. 356, sec. 41.

and therefore the said finding and judgment was insufficient.

Tenth. That the judgment and decree below in the said cause is unsupported by evidence, and contrary to the law of the case.

M. E. AMES, Counsel for Appellant.

The above endorsed as follows: "No. 26, Supreme Court, Amherst Willoughby & Simon Powers, respondents, against Byron D. Miner, appellant. Points and authorities of the appellant. Filed December 15th, 1858. J. J. NOAH, Clerk.

By WM. F. WHEELER, Deputy.

M. E. AMES, Counsel for App'lt."

Supreme Court.

AMHERST WILLOUGHBY & SIMON POWERS, Respondents,
ag'st
BYRON D. MINER, Appellant.

Points and authorities of the respondents:—

First. The equitable title to the property at the time of the execution of the bond to the respondents, was in W. G. & G. W. Ewing. Chute was at the date of the letter of attorney to Olmsted, and for a long time had been the general and confidential agent of the firm of W. G. & G. W. Ewing throughout the northwest, buying and selling land for them, &c. Such agency was and had been notorious, and was sufficient (especially in view of the letter received by him from G. W. Ewing shortly previous to that date) to authorize the making of that letter of attorney. The bond or contract of sale was made in pursuance of that authority, and the respondents fulfilled the terms of the contract on their part in all respects.

Second. But even if the act of Olmsted in making the bond was not authorized at the time, it was subsequently fully ratified by W. G. Ewing; for

1. He (Ewing) was fully advised of the transaction in June following the sale, and his failure *at that time* to dispute or question the *authority* of the agent, operates as a ratified

Story on Agency (4th ed.) sects. 250, 253, & 258.
Johnson *v.* Jones, 4 Bar. S. C. Rep. 313.
Cairnes & Lord *v.* Bleecher, 12 John. R. 305.
Vianna *v.* Barclay, 3 Con. R. 283.
Dunlap's Paley on Ageny, p. 172 note (9), 2 Kent's Com. p. 616, and cases then cited.
Benedict *v.* Smith, 10 Parge, 127.

2. He instructed Babcock if he could not persuade them to take a lease to receive of them the purchase price when due. Babcock, in pursuance of those instructions, received the purchase price of the premises, paid it over to Chute, the general agent, advised Ewing of the fact by letter, and told him the respondents wanted their deed; received a letter from Ewing acknowledging the receipt of his, and requesting him to fill up and send on for execution a deed of the premises to Willoughby & Powers, which he did; and Chute charged himself with the money upon the books of W. G. & G. W. Ewing. This was as full and complete a ratification of the sale as it was possible to make.

Dunlap's Paley on Agency, p. 172, and cases cited.
Story on Agency, Secs. 249, 252 " "

Third. The def't is not entitled to consideration as a *bona fide purchaser* of the property for a valuable consideration, *without notice* of the plaintiff's right.

The bond to the pl'ffs was recorded in June, 1850, but not having been properly acknowledged, the record probably could not operate as constructive notice to any one. But the def't's deed bears date Sept. 27th, 1850, and was recorded Oct. 18th, of that year. His own testimony shows that his pretended purchase was made on the day the deed bears date. He at that time and for many years, both prior and subsequently, was the clerk of W. G. & G. W. Ewing, and even up to the time of the trial in the court below was connected in business with G. W. Ewing, the survivor of that firm. Hence the presumptions are all against his ignorance of the business of that firm.

The pl'ffs' purchase was made 13th March, 1850, and the whole purchase price was paid by them when due, Sept. 1st, of third year.

They went into possession immediately upon the purchase and commenced the erection of a building therein. On the first of July, of that year, they had erected thereon a building 32 by 56 feet in size, and two stories high. The second story finished off, lathed, plastered, &c., for dwellings for two families, at an expense of over $1,700. Both def'ts on that day moved into it, and from that time for several years lived there with their families, and have ever since been in the actual, open, and visible possession and occupation of the premises.

At the date of the deed to the defendants, then, the pl'ffs had paid the full purchase price of the premises, and performed the contract on their part in all respects; they were, therefore, the absolute owners in equity of the property, the mere naked legal title remaining in Ewing; they had, besides, expended in permanent improvements upon the lot at least $1,700, and were then actually residing with their families upon it. A stronger equity cannot well be imaged. A more open, notorious, and visible possession is impossible.

Such possession was notice to the world of the extent of the possessor's interest in the premises. And the defendant was bound to inquire into and inform himself of the interest of the pl'ffs in the premises before purchasing of Ewing.

4 Kent's Com. 178.
Willard's Eq. Jurisprudence, 253.
Grimstune *v.* Carter, 3 Paige, 437, note.
Tuttle *v.* Jackson, 6 Wea., 226.
Daniels *v.* Danielton, 16 Vesey R. 254.
Chesterman *v.* Gardner, 5 John. Ch. 33.
Troup *v.* Hurlburt, 10 Bar. S. C. Rep. 358.

Again. The def't's own testimony shows that he was fully advised of the pl'ffs claim in the spring of 1854, and that he paid no part of the purchase price until several months afterwards. Indeed his own testimony shows that he has never *actually paid* anything for the property; the consideration at most was a *prior indebtedness*, and he has lost or parted with nothing.

To constitute a *bona fide purchase* for a *valuable consideration without notice*, he must be without notice not only at the execution of the deed but *at the time of the actual payment of the money.*

Willard's Eq. Jurisprudence, p. 256.
2 Story's " " S. 1502.
10 Paige's Rep'ts, 180.
Jewett *v.* Palmer, 7 John. Ch. 67.

The decision or "finding" of the judge of the court below being correct *in substance* this court will not review it for a defect *in form*, no such question having been made in the court below, and no exception having been taken in that court.

2 Selden, 356.
3 Komart, 341.

Finally. It is submitted that there is nothing before this court for review except the pleadings, the decision of the court below, and the judg't; and no exception having been taken to the decision in the court below, the only question for this court is whether the judgment is supported by the pleadings, assuming all the issues to have been established in favor of the plaintiffs.

1 Miner R. 297; Claflen *et al. v.* L.

And even if the testimony is to be considered in this court, the objections and exceptions made before the referee must be deemed to have been waived in the court below as none of them were raised or passed upon at the final hearing in that court.

BRISBIN & BIGELOW,
Att'ys for Respondents.

St. Paul, Dec. 6th, 1858.

The above endorsed as follows:—

"No. 26. Supreme Court. Willoughby & Powers, respondents, ag'st Byron D. Miner, appellant. Points and authorities of respondents. Filed July 6th, 1859. J. J. NOAH, Cl'k."

Supreme Court, State of Minnesota.

July Term, 1859

AMHERST WILLOUGHBY and SIMON POWERS, Respondents,
ag'st
BYRON D. MINER, Appellant.

Pursuant to the order of this court duly made and entered at a general term thereof, on the 23d day of July, A. D. 1859, and on motion of Messrs. Brisbin & Bigelow, attorneys for the respondents in the above entitled cause, it is now adjudged and determined that the judgment of the court below, and from which the appeal is taken in this cause, be and the same is hereby in all things affirmed; and that the respondents, Amherst Willoughby and Simon Powers, do recover of the appellant, Byron D. Miner, herein the sum of one hundred and sixty-one dollars and ninety-four cents, that being the

amount of the judgment below with interest to the date hereof, together with the further sum of sixty-eight dollars and ninety-five cents for their costs of this court, amounting in all to the sum of two hundred and thirty dollars and eighty-nine cents ($230\frac{89}{100}$), and that they have execution therefor, dated and signed this 2d day of August, A. D. 1859, at 10 o'clock A. M.

Attest, J. J. NOAH, Clerk.

Statement of judgment.

Am't judg't below,	138 81
Interest to date,	23 13
Costs in Supreme Court in full,	50 00
Term fee, Dec. Term, 1858,	10 00
Docketing and filing transcript below,	70
Clerk's fees,	8 25
	$230 89

A true transcript of the judgment and decree of the Supreme Court in said case certified by me, August 2d, 1859.

[Seal of the Supreme Court, State of Minnesota.] J. J. NOAH, Clerk Supreme Court.

Supreme Court.

AMHERST WILLOUGHBY and SIMON POWERS, Respondents,
ag'st
BYRON D. MINER, Appellant.

Sir: You will please take notice that the costs of respondents in the above entitled cause will be taxed and adjusted by and before the clerk of this court at his office, in the Capitol, in the city of St. Paul, on Tuesday the second day of August, 1859, at 10 o'clock, A.M. of that day, and inserted in the judgment, which will then and there be entered in said cause for the said respondents; also that the following are the items of such costs which will be claimed in behalf of the respondents upon such taxation.

For proceedings before argument,	$20 00
" argument,	30 00
" cl'k fee, Dec. Term, 1858,	10 00
" fees of clerk of this court,	8 25
" " " of court below for filing trans. and docketing judg't of this court,	70
	$68 95

Yours, &c., BRISBIN & BIGELOW,
Atty's for Respondents.

Dated St. Paul, July 30th, A.D. 1859.

To M. E. Ames, Esq., Att'y for Appellant—

Above endorsed as follows: Supreme Court. Willoughby & Powers, respondents, ag'st Byron D. Miner, appellant. No. of tax'n of costs. Service of the within notice is hereby admitted this 30th July, A. D. 1859. M. E. Ames, att'y for appellant. Filed and costs taxed in full at $68\frac{95}{100}$. Judg't in full at $230\frac{89}{100}$. August 2d, 1859, at 10 A. M. J. J. NOAH, Clerk.

BRISBIN & BIGELOW,
Atty's for Respond'ts, St. Paul, Min.

Supreme Court, State of Minnesota.

December General Term, 1858.

WILLOUGHBY & POWERS, Respondents,
against
BYRON D. MINER, Appellant.
} Transcript from Minutes.

December 28th, 1858, 19th day. Ordered that the above cause be continued.

Supreme Court, State of Minnesota.

July General Term, 1859.

BYRON D. MINER, Appellant,
against
AMHERST WILLOUGHBY and SIMON POWERS, Respondents.

Transcript from Minutes.

July 5th, 2d day. This day came the parties, by their attorneys, and this cause came on to be argued by counsel upon the return to the appeal herein, argument for the respondents being had by Mr. Bigelow, and concluded only at a late hour. On motion of Mr. Ames, of counsel for appellant, it was ordered that the court adjourn until to-morrow morning at 9 o'clock.

A true record.
Attest, J. J. NOAH,
Clerk of the Supreme Court.

Supreme Court, State of Minnesota.

July General Term, 1859.

July 6th, 3d day. The court met pursuant to adjournment; present, a full bench.

BYRON D. MINER, Appellant,
against
WILLOUGHBY & POWERS, Respondents.
} Transcript from Minutes.

The argument of this cause was continued by Mr. M. E. Ames on part of the appellant, concluded, submitted to, and taken under advisement by the court.

Supreme Court, State of Minnesota.

July General Term, 1859. July 23d, 14th day.

BYRON D. MINER, appellant,
against
AMHERST WILLOUGHBY and SIMON POWERS, Respondents.

Transcript from Minutes.

After hearing M. E. Ames, Esq., of counsel for the appellant in the above entitled action, in support of the appeal herein, and H. R. Bigelow, of counsel for the respondents, in opposition, and due deliberation thereon, it is now adjudged and ordered, that the judgment of the court below in said action be, and the same is hereby in all things affirmed.

The State of Minnesota, Supreme Court, *ss.*

Appeal from Dist. Court, Ramsey County, 2d Dist.

WILLOUGHBY & POWERS, Respondents,
ag'st
BYRON D. MINER, Appellant.
} Transcript from Register.

Nov. 24th, 1858. M. E. Ames, Esq., attorney for appellant, filed return to appeal, &c., Nov. 26th, 1858. Note of issue filed by Messrs. Brisbin & Bigelow, att'ys for respondents for next December term. On calendar Dec. Term, 1858. Points and authorities for appellant filed Dec. 15th, 1858.

Cause continued until July term, 1859.

June 28th, 1859. Note of issue filed by appellant's attorney. On calendar, for July term, 1859.

July 6th, 1859. Points and authorities filed by respondents' att'y. Cause argued by counsel on both sides, submitted to, and taken under advisement by the court.

July 23d, 1859. Decision of court filed affirming judgment of court below.

August 2d, 1859. Proof of service of notice of taxation of costs filed, and costs thereupon taxed at the sum of sixty-eight dollars and ninety-five cents ($\$68\frac{95}{100}$). Judgment entered against Byron D. Miner, appellant, for the sum of two hundred and thirty dollars and eighty-nine cents ($\$230\frac{89}{100}$), amount of judgment below, with interest and costs of this court.

August 10th, 1859. Mandate and transcript issued. Opinion of court filed.

February 24th, 1860. Citation lodged and approved. Bond filed. Writ of error received and filed from Supreme Court of the United States.

Supreme Court, State of Minnesota, July term, 1859.

AMHERST WILLOUGHBY and SIMON POWERS, Respondents,
against
BYRON D. MINER, Appellant.

Opinion of the court. (By the court, Atwater, Justice.) In March, 1850, one David Olmsted executed and delivered to the respondents a bond for a deed of the lot in question, signed by himself as one of the obligors, and by William G. Ewing, by said Olmsted as his attorney in fact, as the other obligor. The bond was conditional for the execution of a deed to the respondents by the said Ewing (who held the legal title to the lot) upon the payment by the respondents to said Ewing of the sum of three hundred dollars, on or before the first day of September, 1850, that being the price agreed upon for the lot. The complaint alleges that the respondents, immediately after the execution and delivery of this bond, went into possession of the premises described in the bond, and commenced the erection of buildings thereon for business purposes, and have ever since occupied the premises for such purposes, and have expended some three thousand dollars thereon. The three hundred dollars was paid before it fell due, and the obligors thereupon demanded a deed of the lot described in the bond. Ewing refused to execute a deed, claiming that Olmsted had no authority to execute the bond for him, nor to sell the property. The first question presented, therefore, is whether any valid title or interest in the lot passed to Willoughby and Powers, by virtue of the bond executed by Olmsted.

It appears from the testimony that Olmsted never had a properly executed power of attorney from Ewing for the conveyance of land. The only authority (as he states in his testimony) which he had for the execution of the bond was a letter, of which the following is a copy, viz:—

ST. PAUL, August 9, 1849.

David Olmsted, Esq.

Dear Sir: You are hereby constituted my agent to lease and collect rents on my property in St. Paul, and on lands in its vicinity. You are also constituted agent for the sale of the same.

Yours resp'y, WILLIAM G. EWING,
By RICHARD CHUTE.

At the time Mr. Chute wrote this letter he was a partner of W. G. & G. W. Ewing (the name of the firm being Ewing, Chute & Co.), and was also the general agent of W. G. & G. W. Ewing, having charge of their business in the northwest. It also appeared that the lot in question was the property of W. G. & G. W. Ewing in fact, the deed having been taken at the time of purchase in the name of W. G. Ewing for convenience in selling. Mr. Chute testified that he had charge of the business of the Ewings in Minnesota, and

bought and sold land for them here; and that he received a letter from G. W. Ewing directing him to sell all their property in Minnesota, and that it was in pursuance of those instructions that he wrote the letter above quoted to Olmsted, constituting him the agent of Ewing, to lease and sell real estate. It does not appear that Chute had any properly executed power of attorney to convey real estate in Minnesota, although he had held such authority to convey real estate for the Ewings in other places.

The bond executed by Olmsted was an executory contract for the conveyance of land. Such a contract to be valid is required by the Statute of Frauds to be in writing, but is not required to be under seal. (*Stat. Min. p.* 457, *Sec.* 8.) And it is held that if the contract may be made without deed, the seal shall not prevent its inuring as a simple contract, though the authority be by parol, or merely implied from the relation between principal and agent, as if they be partners. (*Lawrence vs. Taylor*, 5 *Hill*, 113.) And in Paley on Agency, note on page 158–160 it is said that "upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement not to be performed within a year, although the several agreements recited must be in writing, signed by the party or his agent thereunto, lawfully authorized, the authority is not required to be in writing. And therefore the authority to contract for a lease or other interest in land need not be in writing, though the authority to sign the lease or instrument by which the interest passes must be so."

An agreement by Ewing to sell the lot in question would have been valid and binding on him by an instrument in writing not under seal. Such an instrument, executed by an agent properly authorized, would be equally binding on the owner, and an authority to give such writing or instrument need not be under seal. Was such authority given to Chute? We think it was. Mr. Chute states in his testimony that by letter of G. W. Ewing he was instructed to sell all the real estate of the firm in Minnesota, and that it was in pursuance of those instructions that he appointed Olmsted agent for the sale of these lands. It may be urged that the letter of Ewing to Chute, if it gave any authority, gave authority to sell the lands, and not to contract for the sale, and having failed to give the legal power actually to convey the lands, from lack of the necessary formality, it failed of its purpose wholly. Such does not seem to be a necessary consequence. The power to sell and convey includes the power to make an executory contract for the sale and conveyance, but the power to do the latter does not necessarily include that to do the former. The testimony stands undisputed, that Ewing had requested Chute, as the agent of the firm, to dispose of their real estate in Minnesota, and that Chute acted in accordance with the instructions in contracting (through Olmsted) to sell this lot to the plaintiffs. The testimony also shows that the lot was

purchased by the plaintiffs in good faith, for a fair and adequate consideration, and that they immediately proceeded to make valuable improvements on the property. The equities are all in their favor, and the objection of the defendant wholly technical. It is based on the ground that the owner of the lot had not given the requisite legal authority to execute an instrument of conveyance of the premises under seal, not that he had given no authority at all to sell or contract to sell. If force can be given to the authority which Ewing did give it would manifestly be in furtherance of justice to do so. This is evidently the doctrine in the case of *Lawrence* vs. *Taylor* above cited, in which, while it is held that a specialty executed by an attorney cannot operate as such in any case unless his power be under seal, yet even in such case it does not follow that it shall not operate at all. And in that case it was held that it might inure as a simple contract, the court also citing in support of this doctrine, *Story on Part.* 197; *Anderson* vs. *Tompkins*, 1 *Broch. C. C. R.* 452, *per Marshall C. J. See also* 2 *Kent, p.* 614, 6*th Ed.; Newton* vs. *Bronson*, 3 *Kernan*, 587.

If, however, there be any doubt as to the extent of the original authority given by G. W. Ewing to Chute, and through him to Olmsted for the sale of the premises in question, we have none as to the subsequent ratification of the contract by Ewing, after the same was made known to him. It is true that he demurred to executing the contract by making a deed for the lot, not on the ground, however, that he disputed the authority of Chute to make the executory contract, but on the ground principally of inadequacy of consideration. The testimony shows that Ewing was in St. Paul subsequent to the making of the contract, and that he then expressed dissatisfaction with the sale of the lot, and that he endeavored to persuade Willoughby and Powers to accept a lease of the premises, but not succeeding, stated to Olmsted (as appears from the testimony of that witness), "that he would give a deed, that the consideration was too small, and he wanted to get the land back again from Willoughby, but if he could not get it back he would give a deed." Of course he could not get it "back," unless he had parted with it, and it is clear that he recognized at least some authority in Olmsted in contracting for the sale of the lot. He (Olmsted) further states that "he (Ewing) never found any fault with my sale, on the contrary, from his general conversation, he expressed approval." Mr. Chute, who was a partner of, and the agent of the Ewings in Minnesota, testifies to conversations with W. G. Ewing in the summer of 1850, about the lot in question, the substance of which was, that Ewing seemed vexed at the sale, and was anxious to have Willoughby and Powers accept a lease, but it does not appear that he denied that he had given Chute instructions to sell the real estate of the firm in Minnesota. He (Chute) also states that he received the money for the lot (through L. A. Babcock, Esq., the agent of Ewing, to whom it had been paid), and charged

himself with the amount on the books of the firm of W. G. & G. W. Ewing.

A. Willoughby, one of the plaintiffs, also testifies that he had several conversations with Ewing in the summer of 1850, about the lot, that Ewing wanted to buy the lot back, and wanted witness to give it up, and offered him $800 for the lot, and a lease of the same for ten years, which was refused.

Mr. Babcock testifies that he saw W. G. Ewing in the month of June, 1850, and was employed by him as the attorney in fact of Ewing for the transaction of certain business. "That as attorney in fact, he had instructions to present a lease to Willoughby and Powers, and have them execute it if they would, and if they executed it, to retain the note until further orders; if they did not execute the lease, I was to receive the money on the note if they paid it." He also states that he notified the Ewings by letter of the payment of the note, and that the receipt of the letter was acknowledged by one of the firm, and that he was instructed by them to fill up a deed of this lot to Willoughby & Powers, and send to them, which he did.

This testimony, with considerable more of the same tenor, stands substantially uncontradicted, and leaves no doubt that Ewing not only recognized the authority of Chute (and through him of Olmsted), to dispose of the property, but is a ratification of the contract made by Olmsted, even if he had no authority orginally to contract for the sale of the lot. It is seldom that a clearer case of the ratification of the acts of an agent is presented, and under the authorities there can be no question but that the principal must be bound by it. (*Johnson* vs. *Jones*, 4 *Bar.* 369; *Dunlap's Paley, Ag.* 172, *and note;* 12 *Johns.* 300; 2 *Kent p.* 616, *and cases cited; Story on Agency*, 239 *et seq.*)

The property in question was sold to the defendant Miner by W. G. Ewing, by deed bearing date September 27th, 1850; and there remains the farther question, whether Miner is a bona fide purchaser for a valuable consideration without notice. The bond given by Olmsted to Willoughby & Powers, was not acknowledged, and had only one subscribing witness, and was not, therefore, entitled to record; and though actually recorded, it could not operate as notice actual or constructive of the contract of sale to the plaintiffs below. No actual notice to the defendant Miner is shown of this contract of sale previous to the date of his purchase from Ewing, though there may be strong reasons for supposing, from the relations existing between the defendant and the Ewings, that he must have had some knowledge of what had transpired in relation to the premises in question; the defendant, however, denies that he had any notice of the contract previous to his purchase; but it is alleged in the complaint that "in the month of April, 1850, the plaintiffs commenced the erection of expensive and permanent

structures upon the premises, which have been continually used and occupied for business purposes by the plaintiffs ever since their erection," &c.

Of this fact we must presume the defendant had notice before his purchase from Ewing, for the denial of the answer is by no means sufficiently definite and specific to rebut such presumption. The statement in the answer is, "that the defendant admits it to be true that the plaintiffs have been in possession of the premises described in the complaint, and that they have erected a building and improvements thereon, and that they use and occupy the same for business purposes. But the defendant says he has not any knowledge or information thereof sufficient to form a belief as to whom or at what time the plaintiff went into possession or occupation of the premises aforesaid; or when they commenced making or made improvements thereon, or what amount they have expended," &c.

This allegation of the answer can scarcely be regarded as less than equivalent to an admission on the part of the defendant, of actual notice of this possession by the plaintiffs; for whenever a purchaser claims an equity, as against another party, from want of notice of the rights or equities of such party, his allegations must be positive and precise, and negative the possibility of his having knowledge of such rights and equities before purchase. "He must not only deny any knowledge of the title of the adverse party; but he must also deny any knowledge of circumstances charged, from which notice may be reasonably inferred. This defence never rests on proofs alone; it must always be made as an allegation; and the denial of notice must be full, positive, and precise. The rule is necessarily strict, but it imposes no hardship on a purchaser, who is always able to state what he knows, and his ignorance of that which he knows not. (*Hopkins Ch. R.; Galatin* vs. *Ewin*, 48 *Metf.* 215, 216; 1 *John. Ch.* 202, 575; 2 *John. Ch.* 157; 3 *John.* 345.)

Tested by the principles above laid down, the answer is clearly defective and evasive, in denying notice of the plaintiffs' possession of the premises, and of the erection by them of valuable improvements, previous to defendant's purchase; it simply states that the defendant is ignorant as to the *time when* the possession of the plaintiffs commenced, and their improvements were made. The defendant in his answer does not deny that he had full knowledge of this possession and these improvements *before he purchased of Ewing.* It is true that the complaint does not allege that the defendant had notice of the possession and improvements of the plaintiffs before such purchase, but in all cases in which a party set up his title to relief in equity, as a *bona fide* purchaser without notice, for a valuable consideration, he must deny notice though it be not charged. (1 *John. Ch.* 302, *above cited.*)

The general rule is, that possession of land is notice to a pur-

chaser of the possessor's title (4 *Kent*, 179; *Grimstone* vs. *Carter*, 3 *Paige*, 437; *Tuttle* vs. *Jackson*, 6 *Wen.* 226; *Chesterman* vs. *Gardner*, 5 *John Ch. Rep.* 33; 16 *Ves.* 254; 2 *J. J. Marsh*, 180.) Willoughby and Powers claim the prior equity in the premises in dispute, and were in possession, and notice of that fact by the defendant was sufficient to put him on inquiry as to the actual rights of the occupants, and he must be presumed to have purchased with full knowledge of their rights and equities.

But there is another fact in the case which precludes the idea that the defendant can be treated as a bona fide purchaser for a valuable consideration without notice. The proof shows that the defendant at the time he made the purchase, gave notes for the purchase money, payable in two and three years. The defendant was notified by Chute in the spring of 1854 of the existence of the plaintiffs' claim. The notes were not paid until the fall of 1854, and were then paid by charging the amount of the notes to the defendant on the books of W. G. & G. W. Ewing, and that after the amount so charged, the Ewings were still owing defendant about six hundred dollars. No part of the purchase money was therefore paid by the defendant until after this knowledge in regard to the plaintiffs' claim, and no money was ever actually paid by defendant, credit having been given to the Ewings to the amount of the notes on their indebtedness to the defendant. To constitute a *bona fide* purchaser for a valuable consideration without notice, he must not only be without notice of other rights and equities at the time of his purchase, but also at the time of the actual payment of the money. *Jewett* vs. *Palmer*, 7 *John. Ch.* 67, *and cases cited;* 10 *Paige Rep.;* 180 *Story's Eq. Jur.* 396, § 1502, *and cases cited.* The cancellation of a prior indebtedness is not considered in law as a valuable consideration, in the sense in which the term is used in the books. To constitute this, money must be actually paid, or the party have parted with its equivalent, which he had in possession. In no view which can be taken therefore, can the defendant be regarded as a bona fide purchaser for a valuable consideration of the premises in question.

The objection is made by the appellant that the judgment is irregular, because the court below did not state the facts found, and conclusions of law separately, as required by the statute. To bring this question properly before this court, it should be upon the denial of a motion to set aside the judgment on this ground, or upon a will of exceptions, a course which was not pursued in the case at bar (2 *Selden*, 356; 3 *Kernan*, 344). The objection at best is rather to the form than the substance of the proceedings, and when it manifest that the judgment must be the same upon the facts and the law, there is no occasion to remand it to correct the irregularity complained of. Stat. Min. p. 564, sec. 55. The judgment of the court below is affirmed. ATWATER.

The above endorsed as follows:—

Supreme Court, Willoughby & Powers, Resp'ts, against Byron D. Miner, App'lt. Opinion. Filed Oct. 25th, 1859, J. J. Noah, Clerk. Atwater.

Supreme Court, State of Minnesota, *ss.*

I, J. J. Noah, Clerk of the Supreme Court of the State of Minnesota, do hereby certify the foregoing to be a true and correct transcript of the judgment roll, files, proceedings, opinion, bond, citation, and other papers, and of the endorsements thereon on file and of record in our Supreme Court in said cause of Byron D. Miner, appellant, against Amherst Willoughby and Simon Powers, respondents. That I have compared the same with the said originals on file and record in our Supreme Court aforesaid, and that the foregoing is a true and correct transcript therefrom.

In witness whereof I have hereunto set my hand and affixed the seal of our Supreme Court at Saint Paul, this thirty-first day of March, A. D. 1860.

[SEAL.]

J. J. NOAH,
Clerk of the Supreme Court,
State of Minnesota.

Endorsed: Minnesota Sup. Court, No. 294, Byron D. Miner, Pl'ff in Er., *vs.* Amherst Willoughby and Simon Powers. Filed 8th January, 1861.

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